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THE UNIVERSITY OF ALBERTA

SELF-DETERMINATION FOR PALESTINIANS: AN INTERNATIONAL LAW PERSPECTIVE

by

GILLY M. BANKOBEZA

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
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Date: 11 October ...., 1988

To my parents Oliva Nyamyero Bankobeza and Hubert Ndyomumanwa Bankobeza for their courageous efforts to support my education.

ABSTRACT

This work attempts to look at the background of one of the explosive international conflicts of our age since the last two World Wars and the work attempts to assess the current events in light of international law. At the centre of the Arab-Israeli conflict there have been Palestinians who were deprived of the homeland which they had occupied continuously and uninterruptedly for almost twenty centuries before the creation of the state of Israel in 1948.

The creation of Israel was approved by the United Nations as a culmination of a long history of struggle by the world Jewry to obtain a homeland preferably in Palestine. This aspiration became more overt after the Balfour Declaration of 1917 in which Great Britain promised to use her best endeavours to facilitate the Jewish objective. However, while at the same time Britain promised to do nothing which might prejudice the civil and religious rights of existing now-Jewish communities in Palestine, the failure to live up to that promise forms the major background of the Arab-Israeli conflict to date.

The British Mandate for Palestine from 1922 failed to work out a lasting solution for both Palestinians and

Jews until 1947 when the United Nations issued a partition plan under which two states with an Economic Union would be formed. The Palestinians rejected the plan, but the following year, in 1948, the state of Israel was proclaimed. Since then, the state of Israel has experienced a series of wars and many Palestinians becoming refugees. The Arab-Israeli war of 1967 was perhaps the most crucial battle in this conflict after resulting in Israeli occupation of Arab territories, including the West Bank and Gaza Strip which, under the 1947 U.N. plan of partition, were envisaged as parts of a Palestine state.

The Palestine Liberation Organization has been fighting for the right to self-determination from 1964 when it was formed and has since succeeded in appealing to the international community to recognize the Palestinian right to a homeland in spite of being labelled as a terrorist organization by Israel. This work makes legal analysis of major issues pertaining to the conflict.

ACKNOWLEDGEMENTS

In preparing this thesis I have been assisted by my supervisor, Professor L.C. Green (Ph.D.) whose in-depth knowledge of the Arab-Israeli conflict has been of great help to me. I thank him for his constructive criticisms and thoughtful discussions which we held throughout the preparation of this work. I should like to thank the University of Alberta/CIDA Scholarship Committee for the scholarship award without which it would not have been possible for me to pursue studies at this University. I also thank the International Centre and the Faculty of Law for the grant given me to cover some of the typing expenses. Many thanks to Ms. Joanna Lubberts who has proved excellent in putting this manuscript in its present form. Finally, I must thank my employer, the Principal Secretary, Ministry of Foreign Affairs, United Republic of Tanzania, for granting me permission for an extended study leave.

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LIST OF ABBREVIATIONS

INT´L LEG. - International Legislation
U.N.Y.B. - United Nations Year Book
I.C.J. Reports - International Court of Justice Reports
I.L.M. - International Legal Materials
I & C.L.Q. - International & Comparative Law Quarterly
N.Y.UNIV.J.INT´L & POLITICS - New York University Journal of International Law & Politics
A.J.I.L. - American Journal of International Law
ANN. DIGEST - Annual Digest
Q.B. - Queen´s Bench (Queen´s Bench Division)
U.S.T. - United States Treaties
I.L.R. - International Law Reports
U.N.T.S. - United Nations Treaty Series
R.I.A.A. - Report of International Arbitral Award
B.Y.I.L. - British Yearbook of International Law
C.M.D. - Command Paper
L.N. Doc. - League of Nations Document
U.N. Doc. - United Nations Document
L.N.T.S. - League of Nations Treaty Series
U.N. SCOR - United Nations Social & Economic Council Official Records
U.N. GAOR - United Nations General Assembly Official Records
ISR. L.R. - Israel Law Review
Y.B.W.A. - Year Book of World Affairs
I.L.Q. - International Law Quarterly
I.Y.H.R. - Israel Yearbook on Human Rights
I.C.R.C. - International Committee of the Red Cross
CAL.L.REV. - California Law Review
UNIV. TOLE.L.REV. - University of Toledo Law Review
ALL E.R. - All England Reports
A.S.I.L. - American Society of International Law
G.A. - United Nations General Assembly
S.C. - United Nations Security Council

CHAPTER I

LEGAL STATUS OF VARIOUS ISSUES DISCUSSED

Section I

The Right to Self-determination

Historical Perspective

For many years, self-determination has been disputed as not being a principle of international law. Many jurists have argued that the principle is incapable of precise definition and that it has political and moral overtones which render it void of legal content. Among the proponents of this approach is Green who, in 1956, called the right to self-determination ". . . a political right. It is not a right under international law. Customary law certainly does not recognize such a right, and as yet, there are but few treaties that concede it."[1] Emerson also took the right of self-determination to be "no more and no less than one aspect of the right of revolution, although it may under special circumstances become a defined and domesticated revolution harnessed to the achievement of basic political change which the dominant forces of the time agree to be necessary or inevitable."[2] These statements were correct at the time when they were made but it is important that they be restricted to their time-frame since the trend against this approach accelerated sharply since 1960 when a Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted by the UN General Assembly in Resolution 1514~~(~~XV).[3] In it the right of self-determination is regarded not as a right enforceable at some future time under indefinite circumstances, but as a legal right enforceable here and now.

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[1] L.C. Green, Report of the 47th Conference of the International Law Association 58 (1956).

The United Nations' practice in this field has departed from the Charter,[4] but Schwarzenberger concedes that this amounts to a de facto revision of the UN Charter which, on the basis of acquiescence or ineffective opposition of a diminishing number of colonial powers, tends to harden into a de jure revision of the Constitution of the United Nations.[5]

The Independence Declaration was followed by the drafting of the International Covenant on Civil and

---

[2] R. Emerson, Proceedings of A.S.I.L. 135-6 (1966).

[3] See the legal effects of UN Resolutions and Declarations, section 1(c) infra.

[4] Under Article 14 the UN General Assembly may only make recommendations in the form of resolutions and declarations.

[5] G. Schwarzenberger, A Manual of International Law, 226-7 (1978).

Political Rights and the Covenant on Economic, Social and Cultural Rights[6] which included a provision on the right of self-determination.[7] The trend in this approach was to acknowledge self-determination as an international legal right.[8] Although the Covenants provide that "All peoples have the right of self-determination . . . ," it has been argued, and rightly so, "that all people do not have the right of self-determination: they have never had it, and they never will have it."[9] This is largely because in its later incarnation, self-determination has a well-defined and limited application.[10]

Self-determination is associated with political emancipation of groups of people in the countries under colonialism, alien occupation and, relatively recently, people under racist regimes, although there may be self-determination in social and economic spheres as well. For the purpose of this work, only the political aspect of self-determination as understood in United Nations practice will be considered.

---

[6] Adopted by the UN General Assembly on 16 December 1966, 6 I.L.M. 360 (1967).

[7] Article 1 common in both Covenants.

[8] R. Higgins, The Development of International Law through the Political Organs of the United Nations 100,103 (1963). Other authors supporting the principle of self-determination as an international legal right include E. Lauterpacht, "Some Concepts of Human Rights," 11 Harvard Law Journal 2 (1965), M. Lachs, "The Law in and of the United Nations Organization," Indian Journal of International Law 432 (1961); I. Brownlie, Principles of Public International Law 595 (1979).

[9] R. Emerson, "Self-Determination Revisited in the Era of Decolonization," Occasional Papers in International Affairs, No. 9, 64 (December 1964) (Cambridge, Massachusetts: Harvard University, Center for International Affairs).

[10] See United Nations practice with respect to the right to self-determination infra.

Self-determination may simply be defined as the right of groups of people to determine their political future and freely pursue their economic, social and cultural development.[11] The United Nations' past practice suggests that self-determination is linked with political independence of groups of people inhabiting defined territories which are under alien control. Reference of this principle is often made to the American (1776) and French (1789) Revolutions of the eighteenth century, as having set in motion a process of political emancipation, although the French Revolution--unlike that of the U.S.A.--was not directed at seeking independence but at improving social and economic conditions of the majority poor people. At particular periods, most notably immediately after World War I, self-determination assumed great prominence in international affairs.[12]

World War I created immense horrors in which small states became dominated by bigger ones while at the same time numerous minority groups of people found themselves under harassment and maltreatment by majority groups even within single states. It was in the interest of both the peacemakers[13] and the oppressed[14] alike that at the end of the war, in 1918, settlement of differences in a peaceful manner should be reached. The then U.S. President, Woodrow Wilson, played a key role in this peace initiative with the right of self-determination to oppressed peoples who would be left free to determine their political destiny being among his peace proposals. This principle was inferred in one of his speeches in which he observed:

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[11] O.U. Umozurike, Self-determination in International Law 3 (1972); Brownlie, op.cit. 593.

[12] See e.g. Cobban, The Nation State and National Self-determination (1969).

> No peace can last or ought to last which does not accept the principle that governments derive all their just powers from the consent of the governed, and that no rights anywhere exist to hand peoples about from sovereignty to sovereignty as if they were property.[15]

The European allies also supported the principle of self-determination as one of their war aims demand against Germany. They wanted restoration of Belgium, Serbia and Montenegro, together with compensation for the damage occasioned by invasion; evacuation of invaded territories of France, Russia and Roumania; the reorganization of Europe guaranteed by a stable settlement based upon the principle of nationalities; the liberation of Italians,

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[13] The Principal Allied and Associated Powers, i.e. U.S.A., Great Britain, France, Italy and Japan.

[14] All occupied territories of east-central Europe experienced hardship during the war, particularly minority groups of people on the basis of their race or religion.

[15] J.B. Scott, Official Statements of War Aims and Peace Proposals 52 (1921).

Slavs, Roumanians, Czechs and Slovaks from foreign domination; and the liberation of non-Turkish peoples from the tyranny of the Ottoman Empire and the emancipation of Poland.[16]

At the signing of Peace Treaties,[17] although none of them contained self-determination as a principle, the war aims demands were fulfilled and, following the establishment of new states which were in future to determine their political destiny, self-determination in some way was achieved.

Discussions in the Peace Conference about the future of German colonies also emphasized the non-annexation and self-determination of these colonies to be the basis of a peace settlement. By Article 119 of the Versailles Treaty, Germany renounced all her overseas possessions in favor of the Principal Allied and Associated Powers. These overseas possessions were placed under the

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[16] D.L. George, 1 The Truth About Peace Treaties 57-58 (1938).

[17] Signed at Versailles on June 28, 1919, M.O. Hudson, 1 International Legislation 1 (1919-1921); also Treaty between the Allied and Associated Powers and Poland (Protection of Minorities) signed at Versailles, June 28, 1919, Hudson, ibid. 283; Treaty between the Allied and Associated Powers and Czechoslovakia (Protection of Minorities) signed at St. Germain-en-Laye, September 10, 1919, Hudson, ibid. 298; Treaty between Allied and Associated Powers and Rumania (Protection of Minorities) signed at Paris, December 9, 1919, Hudson, ibid. 426; Treaty between the Allied and Associated Powers and Greece on the Protection of Minorities, signed at Sèvres 10 August 1920, Hudson, ibid., 489.

League of Nations to be administered by the Mandatory Powers designated by the League Council. The first paragraph of the League of Nations Covenant provided that:

> To those colonies and territories which, as a consequence of the late war, have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization, and the securities for the performance of this trust should be embodied in this Covenant.[18]

This provision reflected the strong view held by the peacemakers who were inclined to see the principle of self-determination observed in the German colonial and occupied territories. The purpose of Article 22, it is said,

> . . . was to create a kind of international island entirely surrounded by international law, a sort of neutral no man's land from which sovereignty had faded out--at least temporarily--leaving it virtually free from the contamination of imperialist and nationalist wars between the powers.[19]

The Mandatory Powers were requested to abstain from any action which would impair the integrity or political status of the territories under their administration so as to ensure the well-being and progress of the population. In other words, they could not unilaterally alter the international status of these mandated territories. The decision of the International Court of Justice in the South-West Africa Cases[20] is instructive on this point:

---

[18] Hudson, ibid. 13.

[19] H.D. Hall, Mandates, Dependencies and Trusteeship 69 (1948).

> As is well-known, the mandate system originated in the decision taken at the Peace Conference following upon the World War of 1914-1918 that the colonial territories over which, by Article 119 of the Treaty of Versailles, Germany renounced all her rights and titles in favour of the then Principal Allied and Associated Powers, should not be annexed by those Powers or by any country affiliated to them, but should be placed under an international regime, in the application to the peoples of these territories, deemed "not yet stable to stand by themselves," of the principle declared by Article 22 of the League Covenant, that their "well-being and development" should form a sacred trust of civilization.

While Austria, Hungary and Poland were reborn from this principle,[21] other states too emerged from the reorganization of boundaries following the recognition of minority communities that they were entitled to the right of self-determination. The newly created states were Czechoslovakia, created after the break-up of the Austro-Hungarian Empire; Finland, Estonia, Latvia and Lithuania, separated from the Russian Empire; and the territorial boundaries of Yugoslavia, Greece and Roumania, were expanded by the break-up of the Austro-Hungarian Empire.[22] However, from the beginning of the Conference, it was realized that the principle of self-determination would not be allowed to wreck national coherence. This was particularly so in the case of minority groups of East-Central Europe for whom it was felt that the formula for the right to self-determination would not operate to the satisfaction of each individual group. In this case:

---

[20] I.C.J. Reports 24 (1966).

[21] Lloyd George, op.cit., Vol. II at 902, 962, 970 ff.

[22] Ibid. 925, 953 ff.; see also provisions for Peace Treaties note 8 supra.

> It was recognized that no matter how frontiers would be drawn, there will always be groups in Europe who will have to live in a state the majority of whose inhabitants are ethnically, linguistically, or religiously different. Hence the international law for the protection of minorities [was] a substitute in cases where the application of the principle of self-determination of nations was, for one reason or the other, not possible or not wanted. The international protection of minorities is, therefore, a strict and logical corollary of the principle of self-determination of nations.[23]

Since the inception of the United Nations, there has been much controversy over the legal validity of the principle of self-determination in international law following its insertion into the Charter of the United Nations[24] as one of the goals to be achieved by its members. Until recently it has been argued that self-determination is an ill-defined principle of policy and morality and, therefore, not part of contemporary international law. However, the United Nations' practice, at least since the Declaration on Granting of Independence to Colonial Countries and Peoples (hereinafter the

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[23] J.L. King, "The Present Status of International Law for the Protection of Minorities," 48 A.J.I.L. 282 (1954).

[24] Articles 1, 55 and 73(b) of the Charter.

Independence Declaration)[25] which denounced "the subjection of peoples to alien subjugation, domination and exploitation" and supported the right of all peoples to self-determination, has tended to show that self-determination is a right open to people under colonial domination and alien occupation.[26] The Declaration did not have binding force on member states but the International Court of Justice in the Namibia Advisory Opinion,[27] speaking of the development of international law in regard to non-self governing territories, described Resolution 1514(xv) as "a further important stage in this development" and went on to state that:

> . . . the Court must take into consideration the changes which have occurred in the supervening half century, and its interpretation cannot remain unaffected by the subsequent development of law through the Charter of the United Nations.

Some publicists have equally ranked Resolution 1514 as a document of major importance. Schwelb claims that it is an assertion about the present state of international law.[28] Higgins believes that it is illustrative of a

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[25] G.A. Resolution 1514(xv) of 14 December 1960, passed by 89 votes to 0 with 9 abstentions (Australia, Belgium, Dominican Republic, France, Portugal, Spain, South Africa, United Kingdom, U.S.A.), U.N.Y.B. 49 (1960).

[26] For analysis of legal character of a Declaration, see note 288, Chapter two.

[27] I.C.J. Reports 31 (1971).

[28] E. Schwelb, "Human Rights and the International Community," in J.N. Moore, Law and the IndoChina War 187 (1964).

"trend towards acknowledging self-determination as a legal right,"[29] and Moore describes it as evidence of "a strong community consensus against colonialism."[30] However, it was not until the adoption of the two Human Rights Covenants[31] that self-determination sought to have a binding legal effect in international law. Article 1, common in both Covenants annexed to General Assembly Resolution 2200A(xxi),[32] provides, inter alia, that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This article attempts to elaborate who are the "self," meaning "peoples," and what are they to determine, i.e. their political, economic, social and cultural development.[33] Both Covenants are binding to state parties after coming into force in 1976.[34]

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[29] Higgins, op.cit. 100.

[30] Moore, loc.cit.

[31] 6 I.L.M. 360 (1967).

[32] Adopted by a vote of 106 to 0 with no abstention on 16 December 1966. U.N.Y.B. 418 (1966).

[33] See discussion on what constitutes a people in Y. Dinstein, "Collective Human Rights of Peoples," 25 Int'l & Comp. L.Q. 103-104 (1978).

[34] The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976; The International Covenant on Civil and Political Rights entered into force on 23 March 1976. U.N.Y.B. 830 (1976).

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations (hereinafter the Friendly Relations Declaration)[35] was another development which elevated the right of self-determination to a principle of international law. The Declaration was adopted by consensus as a response to the need to lay down norms free from the restrictive and self-destroying technicalities of treaty making. In this Declaration, the principle of self-determination was stated in the first paragraph that:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.

The Declaration is of some significance in international law because the principle of self-determination it espouses is repeated in Resolution 3314 on the Definition of Aggression[36] also adopted by consensus. That consensus extends to condemnation of colonialism, apartheid and alien occupation, and expresses support for liberation movements struggling to achieve the right of self-determination.[37]

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[35] G.A. Resolution 2625(xxv) adopted by consensus on 24 October, 1970.

[36] U.N.Y.B. 847 (1970).

[37] See Section II infra. Also S.K.N. Blay, "Self-Determination versus Territorial Integrity in Decolonization," 18 New York J. Int'l Law & Politics 441,446 (1985-86).

Legal Effects of Resolutions and Declarations of the United Nations

Resolutions and declarations of the United Nations are not formal sources of law within the explicit categories of Article 38(1) of the Statute of the International Court of Justice. It is also true that under the UN Charter the General Assembly does not have the legal power to make law or to adopt binding decisions except for certain organizational matters.[38] Yet resolutions and declarations of the General Assembly have had a formative influence in the development of international law in matters of importance to national states.

There are conflicting views whether declaratory resolutions are proper and valid under generally acceptable principles and to what extent they should be accepted as authoritative.[39] It has been argued that they provide standards by which state conduct is judged as to the conformity or non-conformity with the normative prescriptions of the Charter.[40] Also, the law-declaring resolutions that construed the principles of the Charter, whether as general rules or in regard to particular cases, have been regarded as "authentic" interpretation by the parties of their existing treaty obligations."[41] To the extent that they were interpretation and agreed by all the member states, they fit into an established source of law.[42] An outstanding example cited by lawyers and governments is the Declaration of Principles of

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[38] Such as procedural rules (Article 21), regulations for the Secretariat and subsidiary bodies (Article 22) and financial decisions (Article 17).

[39] Among the principal legal studies of the legal value of UN Resolutions are: R. Higgins, The Development of International Law through the Political Organs of the United Nations (1963); O. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations (1966); G. Tunkin, "The Legal Nature of the United Nations," 119 Recueil des Cours 1, III (1966); J. Casteñeda, The Legal Effect of United Nations Resolutions (trans., 1969); M.S. McDougal et al., "The World Constitutive Process of Authoritative Decision," 1 Black & Falk (eds.), The Future of the International Legal Order 73 (1969); g. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations," 137 Recueil des Cours III (1972); Seidl-Hohenveldern, "International Economic Soft Law," 163 Recueil des Cours 65, II (1979).

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[40] Asamoah, *ibid.* 236.

[41] J. Casteñeda, "The Underdeveloped Nations and the Development of International Law," *15 International Organization 38*, 46-48 (1969); M. Lachs, "The Law in and of the United Nations," 1 *Indian J. Int. Law 429*, 439 (1961); O. Schachter, "The Relation of Law, Politics and Action in the United Nations," *109 Recueil des Cours* 165, 185-188, II (1963). In 1980 the U.S. Circuit Court of Appeals (CCA2d) declared that Assembly resolutions "specify with great precision the obligations of member nations under the Charter." *Filartiga v. Pena-Irala* 973 (1980).

[42] Article 31(3) of the Vienna Convention on the Law of Treaties provides that "there shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application."

International Law concerning Friendly Relations adopted in 1970.[43]

Declaratory resolutions that purport to state the law independent of any Charter rule are regarded, in legal effect, as recommendations to member states to accept the asserted rules or principles as legally binding. However, when all the states in the United Nations declare that a stated norm is legally binding, that determination cannot simply be dismissed as ultra vires or reduced to a recommendation because it was made in the General Assembly. In such a case it has been argued that the declaration purports to express an opinio juris communis, not a recommendation,[44] although international lawyers differ on whether the assertion in good faith by all states that a norma is legally binding is sufficient to validate the norm as law even though state practice is inconclusive. Some lawyers argue that at least in some matters the opinio juris communis articulated in a declaration is sufficient to qualify the norm as a customary law,[45] but others consider that the opinio juris must relate to state practice as an essential element of a conclusion that the norm constitutes law.[46]

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[43] M. Sahovic referred to the Declaration as "in the category of official interpretative acts whose binding force derives from consensus of all the members of the United Nations," M. Sahovic (ed.), Principles of International Law Concerning Friendly Relations and Cooperation 48-49 (1972). Tunkin supports this in so far as the Declaration constitutes an interpretation of the principles of international law embodied in the Charter. G.I. Tunkin, "International Law in the International System," 147 Recueil des Cours 151, IV (1975). The United States' position on the legal effect of the Declaration was expressed in the Legal Committee of the UN General Assembly that: "The Charter has, by the normal process of interpretation and evolution, gone through very significant modifications as times and circumstances have changed . . . Such evolution is in our view an invaluable way in which the Charter is maintained as a living, current document.... The Friendly Relations Declaration with its interpretation of key concepts of the Charter . . . is merely one of the more obvious examples of the process of evolution." Statement of R. Rosenstock to the Legal Committee of the United Nations, 5 December 1974, reprinted in Digest of United States Practice in International Law 7 (1974).

[44] O. Schachter, "The Nature and Process of Legal Development in International Society," Macdonald & Johnston (eds.), The Structure and Process of International Law 790 (1983).

In any case, if opinio juris as expressed in resolutions is itself sufficient, new law may be created by agreement of states manifested in their approval of a law-declaring resolution. For example, at its first session in 1946, the General Assembly considered the Nuremberg Principles and affirmed them in a unanimous resolution.[47] Genocide was also unanimously declared a crime under international law at the same session.[48] The Assembly's competence to adopt such resolutions despite the absence of explicit Charter authority to do so was not questioned. Indeed, the resolutions condemning South Africa for apartheid and for its administration of Namibia fell into this category.[49] The fact remains that several resolutions have asserted rules or principles of general international law when practice was inconclusive and that these resolutions have been regarded as sufficient evidence of the legal character of the norm asserted.

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[45] See O. Lissitzyn, International Law Today and Tomorrow 34-36 (1965); M. Akehurst, "Custom as a Source of International Law," 47 B.Y.I.L. 1.8 (1977).

[46] See H. Thirlway, International Customary Law and Codification 58 (1972), E. Suy, "Innovations in International Law-Making Process," Macdonald, Johnston & Morris (eds.), The International Law and Policy of Human Welfare (1978); S. Schwebel, "The Effect of Resolutions of the UN General Assembly on Customary International Law," Proceedings of A.S.I.L. 301 (1979).

[47] G.A. Res. 95(1).

[48] G.A. Res. 96(1).

It therefore seems that the law-declaring resolutions adopted unanimously could be characterized as evidence of what states considered to be the law, always subject to rebuttal on the basis of other indicators that bear upon their authority. The same observation was also made in Texaco v. Libya[50] by the Arbitrator who found that ". . . while it is now possible to recognize that resolutions of the United Nations have a certain legal value, this legal value differs considerably and the conditions attached to its adoption and its provisions. Even under the assumption that they are resolutions of a declaratory nature . . . the legal value is variable."

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[49] G.A. Res. 2074(XX) (1965) condemned the policies of apartheid in Namibia as "a crime against humanity." Res. 2145(XXI) (1966) reaffirmed the prior resolution and terminated South Africa's mandate. Res. 2202A(XXI) (1966) also condemned South Africa's policy of apartheid as a crime against humanity.

[50] International Arbitral Tribunal: Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic (Compensation for Nationalized Property), 17 I.L.M. 1, 29 (1978).

In spite of various views expressed on the legal significance of resolutions and declarations of the General Assembly, it is indisputable that they have had a direct impact upon the development of international law and as such deserve a place among the recognized processes of legal growth. In some instances these resolutions have formed a basis for the preparation of a treaty by the General Assembly itself or by a diplomatic conference convened by it. A considerable number of treaties have been concluded following a formative stage in which a resolution was adopted.[51] It is therefore submitted that resolutions and declarations which may appear hortatory, may come to embody the law as practice develops within the United Nations.

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[51] The Resolution declaring genocide a crime under international law, note 11 supra, laid the foundation for the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 177; G.A. Res. 1962 (1963) on the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, was the basis for the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies," 610 UNTS 205; The Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Res. 1904(XVIII) 1963 was the basis for the International Convention of the same name, 660 UNTS 195. The Resolutions condemning South Africa's Apartheid policies, note 49 supra, led to the International Convention on the Suppression and Punishment of the crime of Apartheid; the text contained in G.A. Res. 3068, 28 G.A.O.R., suppl. 30, UN Doc. A/9030 adopted by G.A. Res. 3068(XXVIII) on 30 November 1973.

Enforcing the Right of Self-determination

In spite of the fact that self-determination is now a legal principle, it is often confronted with the limits by which it can be enforced. Questions asked on how to enforce this principle include whether, by this right, an individual may revolt against a government and whether this right is open to a group of people intent to secede from a well-constituted state. These and other related questions may be answered by examining state practice under both the League of Nations and the United Nations before self-determination became a legal principle.

After World War I, self-determination was granted to both states and minority groups within states, following the signing of Peace Treaties. Under the United Nations, the main focus for self-determination has been to assist non-self governing territories to achieve political independence against colonialism in accordance with the principles of the UN Charter[52] and, recently, against racist regimes. The League of Nations was as opposed to annexation of mandated territories as the United Nations has been against balkanization of colonized territories in the name of self-determination. This practice has since extended to independent states under which, as will be examined later, the right of self-determination excludes secession.

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[52] See note 24 supra.

Beginning with the United Nations Declaration on Granting of Independence to Colonial Countries and Peoples,[53] after affirming the right of self-determination, it warned that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country [is] incompatible with the purposes and principles of the Charter of the United Nations." Subsequently, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States[54] also emphasized the distinctive (but not sovereign) status of non-self governing territories. The paragraph on the principle of equal rights and self-determination of peoples provides, in part, that:

> The territory of a colony or other non-self governing territory has, under the Charter of the United Nations, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self governing territory have exercised their right of self-determination in accordance with the Charter and particularly its purpose and principles.

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[53] See note 25 supra.
[54] See note 35 supra.

Emphasis on the territorial integrity of states is in accordance with the purposes of the Charter set forth in Article 2(1) and 2(4). The right to secede, which might have been considered legal on the strength of the right to self-determination, is frowned upon by the majority of states because it involves dismemberment of a unified independent state. The Friendly Relations Declaration makes it clear that the right of self-determination should in no way mean secession or intervention in the affairs of states. The last two paragraphs state clearly that:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
>
> Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

Together with this consideration, there are other reasons which compel states to discourage secession by groups of people in a unified territory. Most states harbour a fear that the right to secede would constitute an unmanageable threat to intra-state harmony and, consequently, have an adverse effect on the stability of the international system.[55] For example, on African states:

> Taking into consideration the fact that almost all of the[m] . . . are afflicted with the vices of multinational societies and realizing the difficult tasks of nation-building and development, one may tentatively adhere to the narrow interpretation of the principle of self-determination, that is only as related to colonialism.[56]

This narrow interpretation is consonant with the practice of the United Nations and perhaps explains why the attempt of Katanga (part of Zaire) and Biafra (part of Nigeria) to secede in the 1960s was not welcomed by many African states.[57]

The mutual dependency of intra-territorial regions is another reason advanced against secession. There is a feeling that every territorial part is of some strategic importance to the coherence of a unitary state. It is further pointed out that, if the majority or dominant group is hindered by international law to cast out the minority, then the minority should be similarly restricted in their demand for secession. This view was firmly held during the signing of minority treaties in Europe after World War I.[58]

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[55] L.C. Buchheit, Secession: The Legitimacy of Self-Determination 19 (1978).

[56] Y. Makonnen, International Law and the New States of Africa 23-4 (1983).

[57] E.g. in the case of Biafra which tried to secede from the Federal Republic of Nigeria in 1967 was recognized by only four states (Tanzania, Zambia, Gabon and Haiti), in spite of the civil war which lasted thirty months.

[58] See note 8 supra.

The international protection of minorities in the treaties was therefore seen as a substitute in cases where the application of the self-determination principle of nations was, for one reason or another, not possible or not wanted, this arrangement thus being a "strict and logical corollary of the principle of self-determination of nations."[59] In this context, the UN General Assembly is still faced with the problem in the two disputed cases of Gibraltar and the Falkland Islands, where it has not accepted the supremacy of self-determination.[60] These two territories are unusual, however, in that the residents for whom self-determination is sought are not the indigenous inhabitants of the territories.[61] Gibraltar and the Falkland Islands are predominantly populated by citizens or subjects of the colonial power who settled in the colonial territories. International law is unclear as to whether such residents are entitled to self-determination.[62]

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[59] Kunz, loc.cit.

[60] In the case of Gibraltar, see G.A. Resolutions 2231 (1966), 2353 (1967). On Falkland Islands, see G.A. Resolutions 2065 (1965), 3160 (1973).

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[61] (i) The Falkland Islands (or Malvinas) are the subject of a dispute between Argentina and the United Kingdom. The islands are located about 800 kilometers off the Atlantic shores of Argentina. Argentina, the state that succeeded the former Spanish colony, claims the islands on the basis of the rule *uti possidetis*. The United Kingdom, on the other hand, insists on self-determination for the Falklands. The inhabitants, mostly of British origin, have demanded continued association with the United Kingdom through the retention of their colonial status. See generally Metford, "Falklands or Malvinas? The Background to the Dispute," *44 Int'l Affairs 463* (1968).

(ii) Spain ceded Gibraltar to Great Britain in 1713 under the Treaty of Utrecht (Parry, 28 Consolidated Treaty Series 295, 330-31 (1969), Article X). It provided that, if and when Great Britain chose to grant, sell or otherwise alienate the territory, Spain would have a preferential status over all other potential takers. When the issue of Gibraltar's decolonization arose, Spain contended that the preference granted to it by the Treaty of Utrecht took precedence over all other claims including the residents of Gibraltar themselves. Great Britain maintained that Gibraltar was entitled to self-determination and that no cession of the territory could be effected without the free consent of its residents, who had expressly indicated that they wished to be British subjects. Despite the British argument and the wishes of the residents, the General Assembly has requested the United Kingdom to negotiate a transfer of the territory to Spain. (G.A. Res. 3286 (1975)). See generally A. Rigo-Sureda, *The Evolution of the Right of Self-determination: A Study of United Nations Practice 194* (1973).

[62] Rigo-Sureda, *ibid.*

The reluctance of states to permit part of their population and territory to be taken out of their boundaries also takes into account the diminution of the state's wealth, resources and power in particular regions. If secession is allowed, this may in turn lower the economic well-being, defensive capability and potential international influence.

There is also a threat of indefinite divisibility once a state admits the right to secede, which might lead to the virtual disappearance of a bigger state. This is partly because no state or nation has a completely homogeneous population that it cannot afford to be subdivided into smaller groups of greater homogeneity.

The right to secede would also drastically undermine the democratic system by allowing disaffected minorities to threaten dismemberment if state policies do not reflect their wishes. This would appear to contradict the democratic system in which the will of the majority must prevail as long as all parties have been given the opportunity to express their views.

There is also a fear of trapped minorities and stranded majorities in case of secession. In the former case, the secession of a national, racial or religious group from a more heterogeneous state may well result in some non-members of this group remaining behind as "aliens" and exposed to danger of discrimination and harassment.

For example, this is what is happening to Hindus who remained in Pakistan and Moslems in India after the Indo-Pakistan partition of 1947.[63] In the latter case, the awareness that a certain part of a state is rich and could do much better on its own may be one of the significant causes for secession.[64] When there is such an attempt, the future of the remaining area of the state may be at stake when stripped of its economic base. The secessionist attempt by Katanga (Shaba) Province of Zaire in 1960 was in part due to the Province's large mineral deposits,[65] while, in the case of Biafra, access to ports and facilities for external trade and communication might have encouraged the 1967 secessionist attempt from the Nigerian Federation.

Reference to secession has been extensively treated in order to show the specific narrow interpretation given to the right of self-determination. Casesse[66] has given a valuable summary of the principle of self-determination as was envisaged in the United Nations Charter, and he argues that:

> Self-determination was only considered as a means to further the development of friendly relations among States and to strengthen universal peace. It was not considered as an independent value, but only as instrumental vis-a-vis that of peace

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[63] Buchheit, op.cit. 30.
[64] Ibid.
[65] Ibid. 232.
[66] A. Cassese, UN Law/Fundamental Rights 138 (1979).

> . . . . [It] was accepted only in so far as it implied the right of self-government of peoples; it was ruled out that it could authorize secession. Thus . . . territorial integrity of states . . . was held to be paramount.

It is therefore submitted that self-determination has become a principle of international law applicable in situations where peoples under colonial or alien domination are struggling to attain independence and sovereign status. States controlling peoples struggling for this right have a duty to respect and implement it and, in particular, to refrain from using force to deprive these peoples of their right to self-determination.[67]

Section II: The Legal Status of National Liberation Movements

What is a National Liberation Movement?

Any attempt to identify a genuine national liberation movement, especially in the countries under colonial or alien subjugation where, in most cases, there are numerous liberation movements each claiming to fight for the liberation of the country, is a onerous and sometimes subjective undertaking. For the purpose of this work, we propose to follow closely the United Nations' practice in identifying the "genuine" national liberation movements, although even in this attempt it may still be argued that those liberation movements left outside recognition by this body are still true representatives of their people. For this reason, the United Nations has taken a very cautious approach in its resolutions, avoiding direct reference to specific national liberation movements until recently. Therefore, there is no authoritative definition of a national liberation movement; but practice has tended to show that a national liberation movement is that which is recognized as such by the regional organization concerned with the area in which the movement is carrying out its activities.[68] The main distinction between a liberation movement under this category and that arising out of a coup d'état would be the end in view rather than the means. Liberation movements engaged in civil wars or aiming to topple legitimate governments through coups d'état have often found less support since their goals do not aim at furthering the goals set forth in the Charter of the United Nations, especially the peace and stability of nations.

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[67] See more discussion on the right of self-determination in Section IV, Chapter IV infra.

Apart from the aims of the liberation movements, the United Nations and regional organizations, such as the Organization of African Unity (O.A.U.) and the League of Arab States, recognize these movements on the weight of their efficacy to influence change and their command of respect from the populace. Their effectiveness has had to be tested over time by assessing their goals and methods of influencing change. The importance of effectiveness in any successful revolution is presented by Kelsen in the following scenario:

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[68] L.C. Green, Essays on the Modern Law of War 5 (1985).

> Suppose that a group of individuals attempts to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order.[69]

These remarks, although short of making direct reference to national liberation movements, may be applicable mutatis mutandis. These movements have been recognized by regional organizations, the United Nations and many of its specialized agencies on account of their effectiveness in areas where they are conducting struggle.

Identification of National Liberation Movements

The evolution of national liberation movements is not a historical accident having been necessitated by circumstances. From the dawn of history, the world has undergone a process of constant political changes. It has witnessed the rise and fall of empires, sovereignties, kingdoms, monarchies and even states. At different times of history, colonialism, racism, minority oppression, religious persecution, and all types of injustices were a source of might and influence before the political realities of civilization and justice made them incompatible with international law. This process of change came about in large measure through the struggle of oppressed people. The main driving force for new changes has depended very much on the philosophy of national liberation movements by applying peaceful and sometimes violent struggle, in each case circumstances determining the means.

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[69] H. Kelsen, General Theory of Law and State 118 (1964).

At the political level, most national liberation movements recognized by the UN[70] and regional organizations have had a political philosophy based on struggle against all forms of oppression in their own countries. They have acted as rallying forces for demanding political changes in their countries. According to one author:

> By the very nature of a National Liberation Movement, a political change in the society in question becomes inevitable. The Movement itself is likely to formulate its political philosophy as a means of achieving social cohesion among its members. A victorious National Liberation Movement will, as a matter of course, politicize the society, which in turn would become

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[70] South-West Africa Peoples Organization (SWAPO), 1973 U.N.Y.B. 140 (1973); African National Congress (ANC), Pan African Congress of Azania (PAC) (to participate in matters relating to South Africa as observers) U.N.Y.B. 121 (1974); Palestine Liberation Organization (PLO) U.N.Y.B. 189 (1974).

> politically transformed into the politics of the Movement.[71]

Since the political structure largely depends on the legal system in force, the legal structure also has to be changed because, from the Kelsenian approach, "the essence of law is an organization of force, and law thus rests on a coercive order designed to bring about certain social conduct."[72] Therefore, in order to do away with the wrongs of the old order which is replaced, national liberation movements also try to change the legal system under which the old order derived power. Equally important is the fact that:

> Values arising out of a liberation movement are such that the legal machinery of the regime from which the society is liberated is often found to be either unable or unwilling to comprehend or to enforce them. The result, therefore, is that a victorious National Liberation Movement, as of necessity, replaces the legal system it inherits with a new one.[73]

Perhaps this explains the difference between a revolution led by a national liberation movement and one effected through a coup d'état. In the latter case, the preservation of former legal order, together with its laws and personnel, is done as a way of appealing for support from the people and legitimizing the new regime. However, this difference has no great significance because what is important in any new political system is the efficacy of a change sought which makes a de facto political order to become a de jure law-creating source.

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[71] M.L. Marasinghe, "The Legality of National Liberation Movements," 2 Malayan Law Journal xviii (1978).

[72] Cited by Lloyd, Introduction to Jurisprudence 326 (1985).

[73] Marasinghe, loc.cit.

Against this background, it seems that national liberation movements have been born out of necessity. It is through these movements that people living under colonial and alien regimes express their desire to achieve transformation in their lives. This desire becomes a question of life-and-death when excessive humiliation and suffering is exerted on them. Violence, sabotage in various manifestations and wars of national liberation owe their origin to oppressive regimes. One author supporting violence applied by liberation movements in Mozambique, Guinea Bissau and Angola, during their wars of national liberation, argues that this method of struggle "undertaken reluctantly but resolutely by the movements in the three territories, has been an absolutely necessary pre-condition for the freeing of African people there."[74]

If this be taken as a correct justification for applying violence not only in the countries already liberated but also in South Africa and Namibia in which liberation movements are now resorting to violence, it would seem fair to argue that the evil inflicted by departing from peaceful struggle must be less in the long run than the evil avoided by such a departure. Indeed,

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[74] J.S. Saul, "Liberation Movements Provide Structure for Emerging States," International Perspectives 34 (Nov.-Dec., 1974).

> These movements have done more than merely demonstrate that such wars of liberation are militarily effective. It has become increasingly obvious . . . that they are also part of a broader process of popular mobilization and involvement that can serve dramatically to redefine the approach to the problem of underdevelopment . . . .[75]

One only needs to look at the "safety clauses" in most resolutions of the UN General Assembly in support of the peoples fighting against oppression by "all necessary means at their disposal" to realize why most countries support national liberation movements in spite of applying violence as one of their methods of struggle against continued oppression.

The degree of success achieved by these movements in their wars against oppressors appear to have established a precedent and serve to encourage those liberation movements elsewhere which are still struggling. Violence currently being applied by the African National Congress (A.N.C.) of South Africa, the South-West African Peoples Organization (S.W.A.P.O.) of Namibia, and the Palestine Liberation Organization (P.L.O.) has been necessitated by circumstances, but also encouraged by the successful struggle of national liberation movements in other countries, and enjoy a good deal of support from the United Nations.

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[75] _Ibid._

Although it is argued that, strictly speaking, there is no such thing as necessity, it is conceded that defence of necessity may be available as a judgement of value between competing "goods" and a sacrifice of one to the other.[76] Application of violence by national liberation movements seems to be the only sacrifice left to force colonial and alien regimes to come to terms with the oppressed peoples. Since the United Nations recognize the right to self-determination of peoples, national liberation movements feel not only that sacrifice by violence to achieve this right is antecedent to the preservation of peace but also that there is less evil in applying violence so long as the end be better than the prolonged oppression. Reflecting such a necessity, it is asserted that the end justifies the means.[77] As was noted earlier, the end in view serves toes to identify genuine national liberation movements and this partly explains why these movements enjoy the support of many countries in spite of their use of violence.

Violence may also be justified in situations where it is hoped that the end result will be good. The achievement of the right of self-determination is a good result since it involves freeing people from oppression and suppression, and most national liberation movements concede that application of violence in their struggle is, on balance, very good in the end.

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[76] G. Williams, "Defence of Necessity," 6 Current Legal Problems 223 (1953).

[77] J. Bentham, Book of Fallacies, Chap. 13 (1824), cited by Williams, ibid. 225.

National Liberation Movements and the United Nations

Since the Independence Declaration, there has been a spate of resolutions,[78] each reiterating the need to ensure the speedy implementation of this Declaration in accordance with the purpose and principles of the UN Charter. The regime of these resolutions is evidence of states' practice in matters relating to colonial and non-self governing territories. Even if they carry no legal effect, but their consistency in expressing commitment of member states to their obligations under the Charter obliges members at least to consider in good faith assisting the process of decolonization and liberation, this being one of the purposes of the United Nations.

The persistent demand for the right of self-determination has compelled the United Nations General

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[78] See Resolutions 1654(xvi) of 27 November, 1961; 1810(xvii) of 17 December, 1962; 1956(xviii) of 11 December, 1963; 2105(xx) of 20 December, 1965; 2189(xxi) of 13 December, 1966; 2326(xxii) of 16 December, 1967; 2465(xxiii) of 20 December, 1968; 2548(xxiv) of 11 December, 1969; 2708(xxv) of 14 December, 1970; 2878(xxvi) of 20 December, 1971; 2908(xxvii) of 2 November, 1972; 3481(xxx) of 11 December, 1975.

Assembly and the Security Council to invite representatives of the national liberation movements[79] to take part in the discussions on matters relating to their struggle. In due course, some of them have even been accorded observer status in both the United Nations and other international organizations, thereby acquiring legitimacy. Since non-recognition of a sovereign state by an individual state does not affect the status of that state in international law, except in their relations inter se, equally national liberation movements have not lost their legal status by reason of being disapproved by a section of states.[80] This disapproval might have at best slowed--but by no means stopped--the process of realizing the right to self-determination.

There is a good deal of evidence by the United Nations in support of struggle of specific national liberation movements. After the Friendly Relations Declaration emphasized the principle of equal rights and self-determination of peoples as a legal right, states were urged to promote the realization of this right in their joint and separate actions. Subsequent resolutions show the thrust of support to national liberation movements. By resolution 2908(xxvii)[81] the General Assembly reaffirmed, inter alia, that:

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[79] See note 70 supra.

[80] Some western countries, especially the United Kingdom, U.S.A., France, Portugal, Spain (including South Africa), have consistently voted against or at best abstained in resolutions supporting the struggle of national liberation movements.

> The waging of colonial wars to suppress the national liberation movements of the colonial territories in Africa is compatible with the Charter of the United Nations, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples and poses a threat to international peace and security.

The resolution further recognized "the legitimacy of the struggle of the colonial peoples . . . to exercise their right of self-determination and independence by all the necessary means at their disposal." The wording of this resolution represents a shift in the attitude of UN member states toward national liberation movements and perhaps legitimizing wars of national liberation movements if this be one of the "means at their disposal." Another resolution[82] went further to affirm "the national liberation movements of Angola, Guinea Bissau and Cape Verde and Mozambique [as] the authentic representatives of the true aspirations of the peoples of those territories," and the Assembly recommended to all governments, specialized agencies and other organizations within the United Nations system to deal directly with these movements in matters pertaining to their territories.

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[81] Adopted by the General Assembly on 2 November 1972 by a vote of 95 to 5 with 23 abstentions.

[82] G.A. Resolution 2918(xxviii).

The high-water mark in the legitimization of national liberation movements by the United Nations came in 1974 and 1975 when these "quasi sovereign entities" became competitors for international recognition with the established regimes in international conferences. In two resolutions on cooperation between the United Nations and the O.A.U.,[83] the General Assembly decided:

> . . . to invite as observers, on a regular basis and in accordance with the earlier practice, representatives of the national liberation movements recognized by the Organization of African Unity to participate in the relevant work of the Main Committees of the General Assembly and its subsidiary organs concerned, as well as in conferences, seminars and other meetings held under the auspices of the United Nations which relate to their countries, and requests the Secretary General, in consultation with the Organization of African Unity, to ensure that the necessary arrangements are made for their effective participation, including the requisite financial provisions.

In another unprecedented move in 1974, the General Assembly adopted Resolution 3236(xxix)[84] in which, for the first time, it expressly endorsed the Palestine Liberation Organization (P.L.O.). The Assembly appealed to the states and international organizations to extend support to the Palestinian people in their struggle, requesting the Secretary General to establish contacts with the P.L.O., "the representative of the Palestinian people," on all matters concerning the Palestine question. Like the national liberation movements in Africa which claimed their legitimacy through endorsement by the Organization of Africa Unity, the Palestine Liberation Organization base its claim on endorsement by the regional Organization, the League of Arab States, which recognized it as the sole legitimate representative of the Palestinian people at the 1974 Rabat Conference.[85]

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[83] G.A. Resolutions 3280(xxix) of 10 December, 1974, and 3412(xxx) of 28 November, 1975.

[84] G.A. Resolution 3236(xxix) adopted by a vote of 89 to 8 with 37 abstentions. U.N.Y.B. 226-27 (1974).

The Legal Status of National Liberation Movements

The support for national liberation movements is based on the fact that these movements are genuine representatives of the people struggling for the right of self-determination. Their legal validity stems from the consistent United Nations practice expressed through resolutions and declarations in support of the struggle for the oppressed peoples′ right to self-determination represented by national liberation movements. Consistent practice when applied over a long period of time becomes a custom and, insofar as international law is concerned, such a custom may result in a principle of international law when certain factors are fulfilled. The first factor is that such a custom must be applied over a sufficient period of time to demonstrate its general applicability to designated types of situations. National liberation movements engaged in the struggle for self-determination have demonstrated the ability to represent oppressed people with consistent support from the United Nations, regional and other international organizations.

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[85] New York Times, October 29, 1974, at 1 col. 8.

Another factor is that of a custom being accepted, either expressly or implicitly, as legally binding by a very large majority of the states having occasion to express themselves on the matter, including any state which is in a position to frustrate the effectuation of the principle by its unilateral action. The majority of states in the United Nations have spoken in support of the peoples struggling for the right of self-determination and have accepted the national liberation movements as legitimate representatives of the people under oppression. Even those few states which, as a matter of policy, would not accept the status of national liberation movements do find it hard to frustrate their legal standing in the United Nations.[86]

The third factor is that state policy makers must have believed that they were either creating or effectuating a binding legal rule rather than acting out of expediency or purely moral conviction. The recognition of liberation movements by regional organizations and their subsequent invitation to take part in the activities of the

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[86] See e.g. the U.S. attempt to expel the P.L.O. from the United Nations, Section III, Chapter IV infra.

United Nations have already resulted in independence for Angola, Zimbabwe, Mozambique, Guinea Bissau and Cape Verde Islands. Many states which supported movements in these countries in their successful struggle were doing so quite determined to end oppression.

The last factor is to the effect that, even if the custom fulfils the three conditions mentioned above, it does not bind any state which, in the course of its transformation into a rule of law, clearly expresses its objection to the principle. However, this custom would seem to be of less significance for our purpose, taking into consideration the victorious emergence of new independent states led by the struggle of national liberation movements. Former colonial powers and their allies,[87] with varying degrees of consistency, have in the past voted against support for national liberation movements although this action did not prevent realization of self-determination. The Separate Opinion of Judge Lauterpacht in the South-West Africa Voting Procedure Case[88] (although not binding) would appear to render credence to the support enjoyed by national liberation movements in the United Nations in spite of the objection by a few states. On South Africa's consistent disregard for the United Nations' recommendations toward Namibia (formerly South-West Africa), he observed that:

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[87] See note 80 supra.

[88] I.C.J. Reports s120 (1955) (Separate Opinion of Judge Lauterpacht).

> A State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its own peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgement of the Organization . . . may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right . . . .

Judge Jessup arrived at a similar finding in his Dissenting Opinion in the South-West Africa Case[89] regarding South Africa's disregard of the United Nations' resolutions on Namibia's independence, arguing that "the accumulation of expressions of condemnation (of apartheid), especially as recorded in the resolutions of the General Assembly of the United Nations, are proof of the pertinent contemporary international community standard."

Therefore, for national liberation movements, having been supported for over two decades and their cause repeatedly endorsed by the overwhelming majority of the United Nations, their right to self-determination has universal recognition.[90] This is largely because anti-colonialism and anti-racism are no longer merely moral values having been incorporated into such important documents as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States, even states declining to support other measures allowing the latter to pass without opposition.

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[89] I.C.J., Reports of Judgements, Advisory Opinions and Orders - South-West Africa Case, 341 (1966).

Section III: The Nature of Terrorism as Opposed to Wars of National Liberation

Terrorism

It is difficult to attempt to adopt a conclusive definition of a multi-faceted problem such as terrorism which manifests itself in various ways. For the past two decades, terrorism has torpedoed the peaceful intercourse of states and yet there is no single universal interpretation of what terrorism is. This dilemma was once summed in the remarks made shortly after the 1972 Munich killings. Critical of the ambivalent approach to the question of international terrorism after the Israeli army had bombed Palestinian camps in Lebanon and Syria in retaliation to the Munich killings in which Israeli athletes were killed by Palestinians, the U.S. Ambassador wondered whether:

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[90] P.J. Travers, "The Legal Effect of United Nations Action in Support of the Palestine Liberation Organization and the National Liberation Movements of Africa," 17 Harvard International Law Journal 577 (1976).

> Can we justly exclude from the definition of terrorism the Israeli retaliatory raids against Palestinian camps in Lebanon and Syria . . . which surely killed many wholly innocent people and which probably helped create a new crop of terrorists among their relatives and friends? Was that human or wise? The fact is, of course, that there is a vast amount of hypocrisy on the subject of political terrorism. We all righteously condemn it except when we ourselves or friends of ours are engaging in it. Then we ignore or gloss it over or attach to it tags like "liberation" or "defence of the world" or "national honour" to make it seem something other than what it is.[91]

The only finding would seem to be that it is very difficult to arrive at a catch-all definition of terrorism because of the heterogenous nature of the international system in which terrorism as a social phenomenon, its forms, manifestations, incidence and timing vary over time.[92] Even the simple process of tabulation of a series of types of activity which could be condemned as terrorist might rapidly come to be regarded as exhaustive, so that any act not falling within the condemnatory list would be free of the odium of terrorism.[93] We therefore return to the same conclusion, that there is a lack of consensus on what amounts to terrorism, political considerations in this regard taking precedence over any other factors.

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[91] C.W. Yost, "Forms and Masks of Terrorism," Christian Science Monitor, September 14, 1972, 20 col. 5, cited by W.T. Mallison & S.V. Mallison, "The Concept of Public Purpose Terror in International Law," in M.C. Bassiouni, International Terrorism and Political Crimes 83 (1975).

[92] See generally H.H.A. Cooper, "Terrorism: The Problem of Definition," 26 Chitty's Law Journal (1978).

[93] L.C. Green, "Terrorism and the Courts," 11 Manitoba Law Journal 333 (1980-81).

In the face of lacking a universal definition of terrorism, the tendency is for each state or a group of states to adopt its own perception of terrorism looking at it in terms of historical experience, sense of basic values and priority of relations with other states. The main problem with this kind of approach is the absence of uniform coordination of strategies to combat terrorism.

For the sake of convenience, terrorism may be defined as a planned use of force or violence by a person or a group of people or a state or a group of states to commit terror in a peaceful environment or atmosphere with the purpose of gaining concessions from the affected party. The use of force may be aimed at imperiling life or destroying property either selectively or indiscriminately. For our purpose, it suffices to narrow down the interpretation of terrorism to only violent activities potentially horrifying or dangerous insofar as they involve human life or property and quite incompatible with the legitimate acts of warfare. Even this attempt may render it difficult to give convincing classification of activities which take away human life or property to qualify as purely terrorist.

The failure of a consensus approach in the definition of terrorism is attributed to the political considerations attached to the crimes of this nature. Historically, political terror was applied in the early years of the French Revolution (1789-1794) in which the Jacobins resorted to terror to champion their political agenda. The assassination of King Alexander I of Yugoslavia and Jean Louis Barthou, the French Foreign Minister in 1934, prompted by political motives,[94] made France propose to the Council of the League of Nations the adoption of international measures for suppression of political crimes, including creation of an international criminal court.[95] The Council set up a committee of experts to prepare a draft Convention to assure the repression of conspiracies or crimes committed with a political or terrorist purpose. When this draft Convention was ready, it was signed by only twenty states and received a single ratification.[96]

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[94] See Section III, Chapter IV infra.

[95] M.O. Hudson, "Proposed International Criminal Court," 32 A.J.I.L. 551-2 (1938).

[96] India ratified the Convention on 1 January, 1941. The speculation is that this ratification by British India was motivated by considerations of suppressing the nationalist movement of Indian people. See M.K. Nawaz & G. Singh, "Legal Controls of International Terrorism," 17 Indian J. of Int'l. Law 67 (1977).

The failure to ratify this Convention may be attributed to the outbreak of World War II, but it was also due to the political nature of its background especially the clear imprint of assassinations at Marseilles into the Convention.[97] For example, Hungary was one of the states not expected to ratify it because of allegations that it supported the assassins,[98] although it has also been suggested that other states were reluctant to ratify it because of the breadth of terrorism definition.[99] This might be true due to the fact that each individual state adopts its own yardstick with which to measure the criminality of terrorist activities, political aspects being dominant in this measure.

A recent attempt to define international terrorism, by narrowing the political aspect of crimes, appears in the

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[97] The Convention embodied a general definition of acts of terrorism in Article 1(2). The definition referred to "criminal acts directed and intended or calculated to create a state of terror in the minds of particular persons or the general public." Article 2 enumerated such acts as "any wilful act causing death or grievous bodily harm or loss of liberty to:
(a) heads of state, persons exercising the prerogatives of the head of the state, their hereditary or designated successors; (b) the wives or husbands of the above-mentioned persons; (c) persons charged with public functions or holding public position when the act is directed against them in their public capacity." Hudson, 7 International Legislation 863.

[98] L.C. Green, "Aspects of Terrorism," 5 Terrorism: An International Journal No. 4 375 (1982).

[99] C.J.R. Dugard, "Towards the Definition of International Terrorism," 67 Proceedings of A.S.I.L. 94 (1973).

European Convention on the Suppression of Terrorism.[100] The Convention provides, for the purpose of extradition, that none of the following offences shall be regarded as "a political offence or as an offence connected with a political offence or as an offence inspired by political motives":

> (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague on 16 December 1970;
> (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montréal on 23 September, 1971;
> (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
> (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
> (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter, or parcel bomb if this use endangers persons;
> (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

The list of offences in this Convention would appear to be exhaustive, but the problem of this approach from the application of the legal rule of interpretation expressed in the maxim _expressio unius est exclusio alterius_ is that any terrorist act committed outside this list is likely to be excluded from terrorism.[101] Of more interest in the

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[100] _15 I.L.M._ 1272 (1976).
[101] Green, note 98 supra.

European Convention is the proviso in Article 13 recognizing the right of Parties to refuse extradition in respect of any offence referred to in Article 1 if they consider such an offence to be of a political character, thus contradicting the act of listing extraditable offences. The proviso leaves states with a wide discretion of interpreting terrorism to suit their individual political interests.

Before this Convention, in 1972, the United Nations General Assembly, acting on the recommendation of the Sixth Committee,[102] decided to establish an Ad Hoc Committee on Terrorism, composed of 35 members[103] with a mandate of studying the causes of terrorism and later to prepare an instrument for the prevention of international terrorism. In spite of the fact that from the beginning the members agreed to operate by consensus,[104] it failed to make recommendations after facing the problem of definition of terrorism and the remedies thereof. The stumbling block was the consideration of political motive of terrorism. Considering the ideological diversity and political differences among the United Nations members, it is no wonder that the Committee's work was fruitless. This dilemma was better explained by a member state, that the difficulty in defining satisfactorily the element of political motive in terrorism is because states tend to consider acts directed against themselves as terrorist acts, whereas large sectors of public opinion, nationally and internationally, would find it difficult in a number of cases to accept such views.[105]

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[102] U.N.Y.B. 649 (1972).

[103] G.A. Resolution 3034 (xxvii) adopted on 18 December 1972, by a vote of 76 to 35 with 17 abstentions. U.N.Y.B. 649 (1972).

[104] Draft Report of the Ad Hoc Committee on International Terrorism, UN Doc. A/AC/160/L.3 at 4, U.N.Y.B. 777-780 (1973).

In 1984, the United States Congress enacted a law to combat international terrorism[106] by urging the President to seek more effective international cooperation in combatting international terrorism[107] and subsequently both the United States and United Kingdom amended their 1972 Extradition Treaty[108] to exclude specified crimes of violence typically committed by terrorists from the scope of political offence exception to extradition.[109] This was a significant step to improve law enforcement, cooperation and to counter the threat of international terrorism, but it is still to be seen whether such cooperation would ultimately lead to a binding universal Convention against terrorism. Many states are not prepared to make a kind of offer, mixing carrots and sticks in a proportion likely to induce acceptance--this lack of offer is what constitutes various aspects of terrorism.

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[105] UN Doc. A/AC/160/1 at 32, U.N.Y.B. 779 (1973).

[106] Act to Combat International Terrorism, October 19, 1984, 24 I.L.M. 1015 (1985).

[107] Section 201(a) of the Act, ibid.

[108] Signed at London, June 8, 1972, 28 U.S.T. 277.

[109] United Kingdom-United States: Extradition Treaty Supplementary Limiting Scope of Political Offences to Exclude Acts of Terrorism, June 25, 1985, 24 I.L.M. 1104 (1985).

The failure by the community of nations to adopt a common strategy against terrorists is a success for the latter. For example, some organizations such as Baader-Meinhoff, the Japanese Red Army, the Weatherman and Tupamaros, have committed numerous terrorist acts in the past but their activities have never been universally condemned. They apply purely terrorist methods such as dispatching of explosive materials through the mails, destruction of public buildings, attacks against cultural institutions, kidnapping of government and business officials, the seizure of schools with their children, hijackings of means of transport--especially aircraft, attacks against industrial establishments, violence against diplomats and embassies, and so on. However, the United Nations always excludes from condemnation only terrorist acts committed in pursuit of national liberation.[110] As long as people are fighting for the right of self-determination, the United Nations always:

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[110] See e.g. G.A. Resolution 36/171 of December 16, 1981, demanding the release of a P.L.O. member accused of killing people by throwing a bomb in Israel, note 128 infra.

> . . . reaffirm the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and uphold the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations and condemn the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms.[111]

The two-way approach to terrorism by the United Nations was made even more clear in a resolution[112] to which the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents is attached. The Convention itself was adopted by consensus, at least showing the growing concern of states against terrorism; yet the proviso appearing in paragraph four of the resolution makes it clear that abhorrence of terrorism notwithstanding,

> The provisions of the annexed Convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the purposes and principles of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid.

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[111] Resolution 3034(xxvii), note 103 supra.

[112] Resolution 3166(xxviii) U.N.Y.B. 774 (1973).

In the face of lack of unanimity in the United Nations, which is the largest single organization of states, terrorism is likely or has already proved hard to control. Therefore,

> There seems little chance of terrorism being controlled on anything like universal basis so long as international organizations or individual states are prepared to apply a double standard whereby they confer legality and respectability upon acts of violence that are committed by those with whom they sympathize, especially when they can be presented in the language of new international order that places self-determination and independence above any other principle or obligation.[113]

In spite of the apparent stalemate, it is hoped that, if states were prepared to adhere to the commendable work done by the courts by restricting the political motives of terrorist crimes, there would be a breakthrough. Apparently by exploiting the inherent independence of the judiciary, courts have whittled down the political motive of terrorists by administering justice strictly to the letter of the law.[114] In re Castioni,[115] the English court considered what has since become an oft-resorted defence of political motive in the commission of terrorist offences. The court found that, although the defence of a political motive is open in a crime where it is:

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[113] L.C. Green, "Legalization of Terrorism," in Y. Alexander et al. (eds.), Terrorism: Theory and Practice 194-5 (1979).

[114] See generally Green, note 93 supra.

[115] [1891] 1 Q.B. 149 (Q.B.D.).

> . . . shown that the act (in the instant case murder) is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political uprising, or a dispute between two parties in the State as to which is to have the Government in its hands,

it is not enough in the present world of terrorism to set a man free even when it is concluded that "he was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part." The main reason is abusing the "political motive" privilege by engaging in clandestine activities against states, governments and innocent people. As the court held in re Meunier[116] following the political anarchy through indiscriminate explosions engendered by a movement which sought the "reconstruction of society" in France at the end of the nineteenth century, the political motive of the offence as a defence was not available.

> . . . for the party with whom the accused is identified by the evidence and by his own voluntary statement, namely, the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government but anarchist offences are mainly directed against private citizens.

Much more recently, in 1981, the United States Court of Appeals[117] concurred to the extradition of Ziyod

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[116] [1874] 2 Q.B. 415 (Q.B.D.).
[117] 21 I.L.M. 342 (1982).

Abu Eain, a member of the P.L.O., who was accused by Israel of setting a bomb in 1979 that exploded and killed two people and injured many. The petitioner claimed that the bombing was politically motivated and that political offences of that kind are excepted from the extradition treaty. The court held that indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act and, as such, is a common crime of murder not recognized as a protected political act. The petitioner was subsequently extradited to Israel to face murder charges, in spite of the fact that the UN General Assembly had earlier adopted Resolution 36/171[118] of December 16, 1981, demanding that Mr. Ziyod Abu Eain be immediately released.

In other two fairly recent factual events, the plea of a political motive of a crime to mitigate the guilt would not seem to be available because the political nexus between the crime and the victim was very remote. In one incident, in the early 1970s, three Japanese disembarked from Air France at Lod International Airport (Israel).[119] They opened a suitcase and pulled out submachine guns and a half dozen hand grenades. They calmly began firing into the crowd of deplaning passengers and bystanders, sweeping the airport lounge from side to side. When the magazines on their weapons were emptied, they lobbed grenades into groups of people, then reversed the magazines and began firing again. When the carnage was over, among the streams of human blood lay the bodies of 26 dead and 78 wounded. Among those killed were Puerto Ricans arriving for a tour of the Holy Land. In the aftermath, it became clear that the three killers, members of the terrorist Japanese Red Army, were hired by Arabs because they could enter the Tel Aviv airport without raising suspicion. A jubilant P.L.O. spokesman, following the massacre, said, "There are no innocent civilians in Israel since we consider every Israeli as either a soldier fighting us or a colonist occupying our land."[120]

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[118] Ibid. 442.
[119] R.A. Liston, Terrorism 17-18 (1977).

Terrorism knows no political or geographical boundaries or moral limits to areas of occurrence. According to the spokesman for the Popular Front for the Liberation of Palestine, "In today's world, no one is innocent, no one is neutral."[121] The veracity of this statement proved correct in another terrorist incident at Christmas of 1973, when a group of terrorists describing themselves as Palestinians attacked Leonardo da Vinci Airport (Italy) by overpowering the airport's security guards. They sprayed the terminal with automatic-weapons fire and then attacked a Pan American jet on the runway with firebombs. Afterward, they commandeered a German Lufthansa jet and flew it with ten hostages to Kuwait where they surrendered. They left 32 people dead, the majority of whom were Americans. These killings shocked even those most sympathetic to the Palestinian cause, since the American plane was not bound for Israel and few, if any, of the victims were Jews. They were just innocent people who had the misfortune to be in the wrong place at the wrong time. Moreover, the attack did nothing to further the Palestinian cause because, as an influential Egyptian newspaper noted in an editorial, it was difficult "to imagine any benefit from an operation that makes the people of Europe feel that they, not the Israeli aggressor, have to bear the consequences of injustices suffered by the Palestinians."[122] In dealing with cases of this nature involving wanton killings, the Swiss court in *Paravan*[123] rejected the defence of political motive in mass killings and held that:

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[120] Ibid., 28.
[121] Ibid., 32.

> If the political character of the crime is to carry weight, the damages involved must not be out of proportion to the desired result . . . . Homicide--assassination and murder--is one of the most heinous crimes. It can only be justified where no other method exists of protecting the final rights of humanity.

The most relevant judicial decision for our purpose insofar as terrorism and the concommitant political motive of the crime is concerned might be that of Military Prosecutor v. Kassem.[124] Although the court in this case did not address itself to the plea of political motive of the accused who were members of the PFLP, it had to consider at length the legality of their Organization's activities both in municipal and international law. The court found that the adduced evidence about PFLP's activities were inconsistent with municipal law to the extent that "the aim of the Organization (i.e. P.F.L.P.) is to operate by way of sabotage . . . including the attack on persons by every means, to strike at the foundation of the State of Israel and to destroy it." As contrary to international law, the court observed that:

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[122] Cited by Liston, *ibid.*

[123] (1928) Ann. Digest 347 (Switzerland Federal Court).

> The Organization's approach is the same to civilians as to military objectives, and one of its principal methods of solving any problems is armed struggle, i.e. the use of force, including terrorism, murder and sabotage . . . . The body which calls itself the Popular Front for the Liberation of Palestine acts in complete disregard of international law accepted by civilized nations. The attacks upon civilian objectives and the murder of civilians . . . were all wanton acts of terrorism aimed at men, women and children who were certainly not lawful military objectives. They are utterly repugnant to the principles of international law and . . . are crimes for which their perpetrators must pay the penalty.

This was a decision of a local court which nevertheless reflects the legal position of international law, but only when states are prepared to depart from their selective brand of terrorism. Until terrorism is treated as an international crime--without exceptions and qualifications such as those attached to every United Nations resolution referring to terrorism or violence, the work done by local courts and tribunals might not be carried beyond their jurisdictions. Even at the local level, there are already limitations, since the national tribunals:

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[124] (1969) 42 Int'l Law Reports 470.

> . . . are only concerned with the acts of individual terrorists, especially as heads of state would enjoy immunity either on political grounds or as agents of their governments, and as such equally immune from criminal prosecution outside of their own country.[125]

However, it seems that local courts lately have changed this position, especially where international law is concerned. In Filartiga v. Pena-Irala,[126] the United States Court of Appeals for the Second Circuit had to decide whether the torture of a foreign citizen by an official of the same country is a violation of the law of nations and, if so, whether such a violation gives rise to a judicially enforceable remedy and is therefore a tort within the meaning of the local law. It was held in this case that there is now a consensus in the international community that official torture is unlawful and both international law and Paraguayan law prohibit torture.

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[125] Green, note 93 at 355.
[126] 19 I.L.M. 585 (1980).

therefore an additional reason to permit private enforcement. Terrorism, therefore--like torture--needs unqualified abhorrence by all states if they wish to find a common, lasting solution. Otherwise, the address of the once Canadian Secretary of State for External Affairs,[127] sums up the vicious cycle of terrorism and a warning to those countries which harbour or support terrorism. He said:

> Terrorism takes many forms. It is called forth by a wide range of complex situations. The rights and wrongs of these situations are bitterly contested . . . . But . . . there must be no truce with terror. Some acts of terror are the work of deluded and demented criminals; others, of frustrated and desperate men willing to sacrifice their own lives and the lives of innocent people in what they regard as noble cause. When we agree that the cause is noble, we are tempted to condone the terror. But are we wise to do so? The act we condone today may be the one we regret tomorrow, when it is turned against us. For terrorism in the end affects everyone; it is an attack on civilization at large. Violence breeds violence, murder answers murder, and order dissolves in chaos.

Wars of National Liberation

Historical Perspective.

Historically there has been a long chronology of wars fought in the name of liberation to the extent that it is difficult to find a consensus as to their legal justification. This is mainly because war is not fought as an independent thing but, by and large, it is used as a political instrument to further a particular political cause. In this regard, an attempt to look at the legal justification of any war is likely to result in consideration of political aspects behind such a war in order to conclude whether, in light of a particular political motive, the war in question is legally justified.

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[127] Mitchel Sharp, quoted by Green, The Nature and Control of International Terrorism (Occasional Papers, Dept. of Pol. Sc., Univ. of Alberta) 50 (1974).

There is an abundance of literature in the philosophical works of Plato and Aristotle in which reference is made to war as a natural part of politics and justified when directed against those who disputed the power of the state to govern[128] or when its object was the attainment of peace.[129] The early Christian Church condemned war under any circumstances, but after 170 A.D. when the church became an integral part of the Roman Empire, war became a sort of "police action" to restore order and lead people to obey the law. The Empire had come to represent a system of universal peace in which theologically the institution of war was seen as a means of punishment which God inflicts upon the sinful world.[130] The church became involved in preaching state politics in which war had already become one of the means to ensure coherence of the state.

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[128] Aristotle, Politics (Jowett translation) 9 Great Books of the Western World 449-50.

[129] Nichomachean Ethics, Book X, Chap. VI, XVII; Politics, Chap. VII, cited by von Elbe, "The Evolution of the Concept of Just War in International Law," 33 A.J.I.L. 666 (1939).

[130] von Elbe, ibid. 667-68.

The classical writers in this era often recognized the right to overthrow an oppressive monarch, a claim now advanced by national liberation movements. Machiavelli, writing in the sixteenth century, had found that any war which was necessary was just, and the necessity was determined by the preservation of the state.[131] Victoria, another writer after Machiavelli, asserted that each state has a right to declare war because it is an essential element of its sovereignty, although he qualified this right "only in cases where an adequate cause justifies forcible actions with other accompanying horrors and devastations . . . neither the difference of religion, nor the expansion of empire or the promotion of the personal glory of the ruler may justify resort to war."[132] The notion about wars of national liberation first appear in the works of Karl Marx in the nineteenth century, but since then has survived with varying degrees of success. The uprising against occupational forces in Europe during the nineteenth century received external support largely because, as Marx observed on the Spanish and Hungarian demonstrations,

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[131] N. Machiavelli, The Prince, Great Books of the Western World 36.

[132] Cited by von Elbe, op.cit., 674-76.

> A people resolved to be independent should not be satisfied with conventional methods of warfare. Riots, revolt and guerrilla tactics are the ways by which a small nation can overcome a large one. It is the only way a weak army can resist a large, well-trained army. The Spaniards demonstrated this in 1807-1812 and the Hungarians did the same thing more recently.[133]

These remarks were very important because they heralded a wave of revolutionary wars in the Spanish colonies of Central and Southern America before spreading to Asia and Africa. The early influence of Marx in the wars of national liberation is found in the works of Lenin who, like the earlier classical writers,[134] treated war as part of politics, to be expressly for the achievement of political goals.[135] According to Lenin's thesis, wars of national liberation are waged on a class basis, by the inferior class, the proletariat aiming to overthrow capitalism in order to establish a socialist society. After looking at the evolution of past history, he predicted the overthrow of capitalism in the future by waging "just" wars. He wrote that:

> The epoch of 1789-1871 left deep traces and revolutionary memories. Before feudalism, absolution and alien oppression were overthrown, the development of the proletarian struggle for socialism was out of the question. When speaking

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[133] Cited by H. Chambre, From Karl Marx to Mao Tse-Tung 215-16 (1963).

[134] See notes 131 and 132 supra.

[135] V.I. Lenin, The Collapse of the Second International (1915), cited by Possony, Lenin Reader 448-90 (1966).

> of the legitimacy of "defensive" war in relation to the wars of such an epoch, socialists always had in mind precisely these objects, which amounted to revolution against medievalism and serfdom. By "defensive" war socialists meant a "just" war in this sense. Only in this sense have socialists regarded, and now regard, wars "for the defense of the fatherland" or "defensive" wars, as legitimate, progressive and just. For example, if tomorrow, Morocco were to declare war on France, India on England, Persia or China on Russia, and so forth, those would be "just" "defensive wars," irrespective of who attacked first; and every socialist would sympathize with the victory of the oppressed dependent, unequal states against the oppressing slave-owning, predatory "great" powers.[136]

In order to fulfil the agenda of socialism, it seems Lenin was livid with colonialism among other things as an obstacle to a clear path to socialism. Stalin, his revolutionary successor, made it clear at the Fifth Congress of the Communist International in 1924 that in order to complete the socialist agenda, liberation movements in the colonies have to form an alliance with the proletariats in Europe:

> Leninism has proved . . . that the national question can be solved only in connection with and on the basis of the proletarian revolution and that the road to victory of the revolution in the West lies through the revolutionary alliance with the liberation movements of the colonies, and dependent countries against imperialism . . . . Leninism recognizes the existence of revolutionary capacities in the national liberation movements of the oppressed countries and the possibility of using these for overthrowing the common enemy, for overthrowing imperialism.[137]

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[136] V.I. Lenin, What is to be Done (1902), cited by Firmage, "National Liberation and the Third World," in J.N. Moore, Law and Civil War in the Modern World 315 (1974).

[137] Stalin, The Foundations of Leninism (1924), cited by F. Schatten, Communism in Africa 63 (1966).

In any case, modern ideas of wars of national liberation find roots in the Soviet thesis, although they are referred to as "just" and not necessarily "legal" wars. According to Machiavelli,[138] any war was just so long as it was necessary and necessity was determined by the preservation of the state. However, this concept has outlived its relevance at least in the universal sense, in view of the fact that at present no state can wage wars as it pleases because of the outlawry of war by the UN Charter--although some UN members seem to revert again to the concept of "just" war by supporting wars of national liberation. Wars of national liberation differ in each case according to local circumstances. Since the rise to power by the Chinese and Yugoslav Communist Parties, after waging war against the dictator Chiang and German invasion respectively,[139] these wars have spread to other parts of Asia and Africa. The political essence--but by no means legal justification--of these wars is found in the comments of Mao-Tse-Tung, the first leader of communist China. According to him, winning battles in the war depends on the politicization of the army. He is quoted to have said that:

> In building a people's army, prominence must be given to politics, i.e. the army must first and foremost be built on a political basis. Politics

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[138] Machiavelli, loc.cit.
[139] Firmage, op.cit.

> is the commander, politics is the soul of everything. Political work is the lifeline of our army. True, a people's army must pay attention to the constant technique, but in its fighting it does not rely purely on weapons and technique, it relies mainly on politics, on the proletarian revolutionary consciousness and courage of the commanders and fighters, on the support and backing of the masses.[140]

Although many wars of national liberation have been fought on an ideological and political basis, there still are many military dictatorships which have won battles and rule without clear political ideologies.

Legal Status of Wars of National Liberation in United Nations Practice

The concept of wars of national liberation did not acquire universal recognition until about two decades ago when it became imperative for the United Nations to assist colonial peoples in their struggle for the right of self-determination against colonialism, alien occupation and racist regimes. Difficulties arose after the UN General Assembly adopted the Independence Declaration in which it was declared, *inter alia*:

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The Declaration did not make clear whether by this right people can apply force to realize it and whether other states have the right or even the duty to aid the people under oppression in their struggle for self-determination.

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[140] *Ibid.* 3.

People fighting wars of national liberation have strenuously justified these wars by arguing that, since colonialism resulted from use of force, oppressed peoples under colonial rule are justified to fight back and defend themselves against external aggression. This view is generally held by many countries formerly under colonial rule with the support from communist countries. It is argued that:

> . . . refusal to oppressed peoples of the right to make use of national liberation war as an extreme and temporary measure in response to the forcible attempt to hold them back in a position of colonial dependency and imperialistic oppression runs counter to established, universally recognized principles and norms of international law. With fire and sword the Western powers seized and kept "their" colonies. But aggression and annexation cannot remain unpunished . . . . Refusal of the necessity of punishment for aggression and annexation means the recognition of lawlessness and international relations.[141]

Holding such views raises the problem of reprisals which in most cases tend to aggravate the situation rather than doing good. Even if colonialism was established by force, the UN Charter restricts resorting to armed conflict save for self-defence against overt attack and always subject to ultimate approval by the Security Council.

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[141] M. Lachs, The 1954 Geneva Agreements in IndoChina 189, cited by G. Ginsburgs, "'Wars of National Liberation' and the Modern Law of Nations - The Soviet Thesis," 29 Law & Contemporary Problems 915 (1964).

Therefore, some states would like to strictly adhere to the Charter principle of non-use of force, since exceptions might lead to failure of maintaining international peace. Thus,

> To say that a select group of states, picked on the basis of their colonial past, holds the right at any time and by its own choice to rely on force against an imperial nation in order to "liberate" the latter's dependencies is to conspire against the very raison d'être of the United Nations and the sundry procedural safeguards devised to ensure its effectiveness as a bulwark of peace.[142]

However, following a melange of resolutions and Declarations of the United Nations recognizing the legitimacy of the struggle by peoples under colonial, alien and racist regimes, wars of national liberation have now been sanctified. Both the Friendly Relations Declaration[143] and the Declaration on the Definition of Aggression[144] contain provisions reaffirming the right of colonial peoples to self-determination and the prohibition of the use of force against them. If such force is used against colonial peoples, the Friendly Relations Declaration states that:

> In their actions against and resistant to such forcible action in pursuit of the right of self-determination, such peoples are entitled to receive support in accordance with the purposes and principles of the charter.[145]

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[142] Ginsburgs, ibid. 931.

[143] See note 35 supra.

[144] Resolution 3314(xxix), see note 36 supra.

[145] Fifth Principle of the Declaration, namely, "Equal Rights and Self-Determination of Peoples."

The Declaration on the Definition of Aggression, after restating the prohibition of the use of force against colonial peoples in almost identical language as that of the Friendly Relations Declaration, in Article 3 enumerates acts which characterize aggression but which should not be seen as aggression if applied by a colonial people, according to Article 7 which reads:

> Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations . . . particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

During the debate in the Sixth (Legal) Committee of the General Assembly, several states had stated that Article 7 could not be interpreted as justifying the use of armed force by oppressed peoples and that reference to struggle of these peoples could only be interpreted as meaning struggle by peaceful means, and not as a condonation of the use of force contrary to the Charter. However, on December 14, 1974, the General Assembly adopted without a vote resolution 3314(xxix) to which the definition of aggression was annexed as a UN Declaration. It did so on the recommendations of the Sixth Committee on a proposal by, inter alia, states which had earlier expressed reservation on Article 7.[146]

The two Declarations marked a shift of approach from exclusively supporting peaceful struggle to the use of force by oppressed peoples. In this regard, wars of national liberation rather than being illegal under Article 2(4) of the Charter are currently regarded as an exception to this rule according to Article 7 of the Declaration on the Definition of Aggression. While this implied conclusion is rebuttable, the elevation of wars of national liberation from the status of internal to international armed conflict in the 1977 Protocol 1 on reaffirmation and development of international humanitarian law applicable in armed conflict[147] has left little doubt of its legitimacy in international law.

Applicability of the Laws of War

The UN General Assembly resolution 2444(xxiii) entitled "Respect for Human Rights in Armed Conflicts"[148] forms the background of the Geneva Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict.[149] The resolution invited the UN Secretary General in consultation with the International Committee of the Red Cross (ICRC) to study:

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[146] U.N.Y.B. 846 (1974).

[147] Article 1(4) of Protocol 1 which refers to wars of national liberation provides that "the situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations." See note 126 infra.

[148] Adopted unanimously by the General Assembly on 19 December, 1968. U.N.Y.B. 611 (1968).

> (a) steps which could be taken to secure the better application of existing humanitarian conventions and rules in all armed conflicts:
> (b) the need for additional humanitarian international conventions or if possible revision of existing conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts, and the prohibition and elimination of the use of certain methods and means of warfare.

The existing laws relevant to situations of war were deemed inadequate. The 1949 Geneva Conventions on the Laws of War (hereinafter referred to as Geneva Laws) did not consider situations of guerrilla warfare because they were:

> . . . moulded on the basis of the assumptions of conventional warfare in regular armies . . . confront each other along an equally distinguishable front-line. In wars of national liberation, in view of the disparity in strength--especially in fire-power, mastery of the air and technological knowhow in general--between colonial armies and freedom fighters, the latter have to resort to unconventional guerrilla warfare. This is a revolutionary method, a poor man's war based on mobility, surprise and camouflage. It does not involve a clearly defined frontline and the distinction between combatants and civilian populations is much more blurred and consequently much more difficult to operate than in conventional warfare.[150]

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[149] 16 I.L.M. 1391 (1977). The Protocols were adopted by consensus on 8 June, 1977.

[150] G. Abi-Saab, "Wars of National Liberation and the Laws of War," 3 Annals of International Studies 108 (1972).

Although the historical background of the diplomatic conference leading to the adoption of the 1977 Geneva Protocols is not of much interest here, the UN resolution 3103(xxviii)[151] adopted on the eve of the conference may be crucial because it characterized wars of national liberation as international conflicts and emphasized the urgent need for enacting laws most suitable to these conflicts. The resolution provided in part that:

> The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.

The only Geneva Law relevant to situations of guerrilla warfare prior to the 1977 additional Protocols is Article 4 of Convention III on Treatment of Prisoners of War.[152] Of the six categories of persons, enumerated under this Article, only three may be considered applicable to situations of wars of national liberation, namely:

> (1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps, forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to

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[151] Adopted by a vote of 83 to 13 with 19 abstentions on 12 December, 1979, U.N.Y.B. 552 (1973).

[152] 75 U.N.T.S. 135 (1950).

> a party to the conflict and operating in or outside their ~~own~~ territory, even if the territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of the regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

The Geneva Laws apply to belligerent situations between states but could also apply to non-state entities even before the 1977 Protocol if those non-state entities merely state to observe provisions of Hague and Geneva Conventions and hope other states would do the same. The main reason for this flexible approach to non-state entities rests on the fact that the Geneva Conventions are open conventions and their observance is not subject to any conditions of substance or procedure except for a written notification to the depository.[153] Moreover, since the laws of war are humanitarian in nature, it would be inconsistent with this spirit by excluding them from applying to national liberation movements some of which command allegiance of the population in areas in which they are fighting wars of liberation. These factors were seriously considered in

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[153] Abi-Saab, *op. cit.* 102-7.

Protocol 1 additional to Geneva Conventions which addresses itself more specifically to situations of wars of national liberation and guerrilla warfare. Apart from Article 1(4) of Protocol 1, paragraph 3 of Article 96, which speaks of the authority representing a people, is also an important provision. Liberation movements are considered in this Protocol not in themselves as recognized belligerents or rebels, but as representatives of a people struggling for self-determination.

The most important feature of the 1977 Geneva Protocol 1 was to make it possible for national liberation movements to conduct their hostilities in accordance with the laid-down rules of war, a step which would distinguish them from purely terrorist activities. Whether these rules are practically followed owing to the peculiar conditions of guerrilla warfare is difficult to tell, but as one commentator reacted on such skepticism:

> The essential requirement . . . [is] not the technical apparatus or the material means, but the will to apply the principles of humanitarian law.[154]

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[154] G. Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols," *165 Recueil des Cours* (Hague) 431 (1979).

CHAPTER II

EVOLUTION OF THE PALESTINE CONFLICT

Section I: Ancient History

The Early Inhabitants of Palestine

The present Arab-Israeli conflict emanates from historical claim of rights over Palestine--both Arabs and Jews claim to have title to the same land. For Arabs, a common feeling is that they have an inalienable right to a land inhabited for more than a thousand years, while at the same time the Jews feel themselves to have an indissoluble bond to the land that had been the cradle of the Jewish heritage. These conflicting claims can only be considered better by looking at the pattern of settlements in Palestine up to the time when open conflict between the Arabs and Jews came to the fore. However, even this attempt may not be conclusive proof of who might have actually settled first in what until 1948 was known as Palestine. It is thus conceded by one Jewish historian that:

> It is, of course, a moot point whether research into Israelite protohistory will ever go beyond the hypothetical stage. Perhaps biblical tradition itself intended to pass on only the early Israelites' own conjectural conception of

> their national antecedents. Thus it is preferable to regard this tradition, a product of innate historical consciousness with which the people of Israel was blessed, as a working hypothesis for any attempted reconstruction of the events.[1]

The earliest inhabitants of Palestine are said to be the Canaanites who inhabited the country from about 3000 B.C. and founded the city of Jerusalem.[2] The Jews made their first contact with Palestine about 1802 B.C. when Abraham led his Bedouin followers to Palestine, which was then under the control of the Canaanites.[3] They did not establish themselves in Canaan as they later migrated to Egypt where they lived for several generations. Their movement from Canaan to the land of the Nile (Egypt) was motivated primarily by commerce, although further migration might also have been motivated by famine in Canaan or sale into Egyptian slavery.[4]

After a long period of oppression under the Egyptian King, coupled with the Israelites' tradition of redemption from bondage, it was around the year 1200 B.C. that Moses led the Jews back to Canaan. Saul united them into a Kingdom, himself becoming King before the unification process was accomplished by his successor, David, by the year 1000 B.C. His son Solomon built the First Temple in the city of Jerusalem, which is one of the bases for Jewish interest in Palestine today.

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[1] H.H. Ben-Sasson, A History of the Jewish People 30 (1976).

[2] H. Cattan, Palestine and International Law (1st. ed.) 3 (1976).

[3] A. Eban, My People 5 (1968); F.J. Khouri, The Arab-Israeli Dilemma (3rd ed.) 1 (1985).

[4] Ben-Sasson, op.cit. 40.

The Kingdom of David did not last long, for after the death of Solomon in 922 B.C., it split into the northern Kingdom of Israel and the southern Kingdom of Judah. This disunity culminated into a process of disintegration because enemies were able to exploit weakness in both Kingdoms. In 721 B.C., the northern Kingdom of Israel was invaded and destroyed by the Assyrians, while the southern Kingdom of Judah continued to exist until it was attacked by the Babylonians in 586 B.C., which scattered the people as well as destroying the First Temple. This marked the end of organized Jewish rule in Palestine, whose "twelve tribes were deported to the Caucasus, Armenia and in particular Babylonia, and disappeared, and with them the Jewish people in the plenitude of its existence as a simultaneously ethnic, national and religious community also disappeared forever.[5]

However, in 520 B.C., the King of Persia allowed the Jews to return to Palestine, but they never regained power in spite of constant revolts by those who returned. They first lived under Persian rule, and later under

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[5] G. Friedmann, The End of the Jewish People? 226 (1968).

Macedonian and Roman rule. After the two major revolts in A.D. 70 and A.D. 135, which led to the levelling of the Second Temple and the destruction of Jerusalem, all Jews were expelled from Jerusalem and quite a few remained in Palestine after that date.[6]

The Christians ruled Palestine from A.D. 323 until A.D. 614. During this period, Christianity became politically significant for Palestine with the conversion to Christianity of Emperor Constantine, who moved his capital from Rome to Constantinople. Many churches were built and Palestine began to attract Christian pilgrims, although scattered Jewish communities continued to live among the Christian majority.[7] In A.D.614 the Persians invaded Palestine, captured Jerusalem and destroyed the Christian churches. The Byzantines reconquered Jerusalem in A.D. 628; but around A.D. 634 it was lost again, this time to the Moslem Arabs during the Caliphate of Omar, successor of the Prophet Muhammad.

The Islam teachings of Prophet Muhammad in the early part of the seventh century united Arab tribes and, following his death in A.D. 632, his followers conquered a vast area before their rule ended in 1071. From that date onward, most of Palestine fell under the control of the Seljuk Turks (1071-1099), the Crusaders (12th and 13th centuries), the Tartars and Mongols (1244-1260) and the Mamlukes of Egypt (1260-1517). From A.D. 1517 to World War I, it was ruled by Ottoman Turks and throughout this period the majority of the inhabitants remained Arab and Muslim.[8]

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[6] Khouri, op.cit. 2; Cattan, op.cit. 5.

[7] Cattan, ibid. 6.

This brief early history of Palestine demonstrates how the Jews were not the only inhabitants of this area, let alone not being the earliest occupants. The Palestinians of today are the descendants of Philistines, the Canaanites and the other early tribes which inhabited the country.[9] Until the latter part of the nineteenth century, Jewish interest in Palestine was basically religious and humanitarian. With the increasing size of nationalism in Europe and the intensification of anti-Semitism in Russia and Europe in the 1880s, a number of Jews concluded that unless they attained their own national home, they were bound to face continuous hatred and discrimination.

Anti-Semitism is a term used in England from the twelfth and thirteenth centuries onward, in Spain in the fifteenth century, and later on throughout most of Europe in the nineteenth century to designate the organized movement or other manifestations against the Jews and, more loosely, hatred of the Jews generally. According to one source,[10] the Jewish hatred first became popular in Germany, the classical land of medieval Jews. Here, Jewish progress in all walks of life and activity in the course of the nineteenth century had been particularly marked and created general resentment and jealousy. From Germany, anti-Semitism spread to other countries of Europe in the late nineteenth and early twentieth centuries.

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[8] Khouri, loc.cit.

[9] "The Palestinian Arab of today, then, is a descendant of Philistines, the Canaanites and other early tribes, and of the Greeks, Romans and Arabs, Crusaders, Mongols and Turks." M. Menuhin, The Decadence of Judaism in Our Times 18 (1965).

It was Leo Pinsker (1821-1891), a Russian Jew, who first expounded the concept of Jewish nationalism in his book entitled Auto-Emancipation in 1882. His thesis pleaded for self-emancipation through the creation of a national homeland, preferably in Palestine, but if that was not feasible, in any other desirable land.[11] Later, Theodore Herzl (1860-1904), an Austrian Jew, became increasingly interested in the Jewish problem, first advocating assimilation as a solution; but after publishing his book, The Jewish State, he defined the Jewish assimilation as impracticable because their plight would deteriorate due to their social and economic position. According to him, the solution was the founding of a Jewish

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[10] The Standard Jewish Encyclopedia (revised ed.) 122-129 (1966).

[11] A.L. Sachar, A History of the Jews (revised ed.) 122-129 (1966).

State by an international agreement.[12] He called for a Jewish Congress which was attended by Zionist representatives from all over the world in Basle, Switzerland, in August, 1897. Here was drawn up the famous Basle program: ". . . to establish for the Jewish people a publicly and legally assured home in Palestine."[13]

Several steps were taken to make the program of Zionism practical. A Jewish colonial trust was organized in London for credit and banking, supported by tens of thousands of small Jewish stockholders. The Jewish National Fund maintained by voluntary contributions was established in 1901 to purchase land in Palestine as the property of the entire Jewish people. Within a few years, there were several new settlements in Palestine. Herzl spent the rest of his life making diplomatic negotiations with various European statesmen with a goal of securing a charter for his people which would legalize Jewish settlement in Palestine on a corporate basis.[14] It was through this early effort that the British Government was later able to promulgate the Balfour Declaration in 1917, thereby paving the way for the establishment of a Jewish State in Palestine.

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[12] T. Herzl, The Jewish State: An Attempt at a Modern Solution of the Jewish Question (translated by S. D'avigdor) 27-30 (1934).

[13] Sachar, loc.cit.

[14] H.M. Sachar, The Course of Modern Jewish History 272 (1977).

Historical Claim of Title under International Law

The Jewish claim to have a historic right of a home in Palestine can only be appreciated by examining its legal validity under international law. The Jewish claim was first advanced during negotiations between the Zionist Organization and the British Government, leading to the Balfour Declaration in 1917 and subsequently in the Zionist Organization's Memorandum of February 3, 1919, to the Supreme Council of the Allied Powers at the Paris Peace Conference.[15]

The Zionist claim may be established by setting up a "critical date." In some of the leading cases on territorial claims, tribunals have had occasion to set a "critical date" in the sense that a decision one way or the other over a certain claim would largely turn upon what was found to be the position at that date.[16] A "critical date," therefore, means "a date after which any actions of the parties can no longer affect the issue,"[17] the object being to prevent one of the parties from unilaterally improving its position by means of some step taken after the issue has been definitely put forward.

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[15] See J.C. Hurewitz, Diplomacy in the Near and Middle East (Vol. II) 45 (1956).

[16] The concept of the "critical date" seems to have been derived from the terminology employed by Judge Huber, the sole arbitrator in the Island of Palmas case (1928) 2 R.I.A.A. 829. It is also referred to in the Eastern Greenland case (1928) R.I.A.A. 45, and the Minquiers and Ecrehos case, (1953) I.C.J. Reports 64.

[17] G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law Part II," 32 B.Y.I.L. 20 (1955-56).

For the Jewish claim to Palestine as their historic home, a "critical date" would appear to be 1917, when the British Government formerly made a promise to establish a home for Jewish people in Palestine.[18] Subsequent to this promise, in 1919, the Zionist Organization presented their claim before the Paris Peace Conference by portraying earlier possession of Palestine as creating a close bond culturally between Jews and the area in dispute. However, international law does not confer title to an ancient historical connection to a people whose occupation left no significant impact to a territory under claim. The Zionist Organization would be at pains to invoke the doctrine of acquisitive prescription[19] in order to sustain their claim under international law. Since this doctrine requires proof of either immemorial possession or uninterrupted possession (justus titulus), it is more favourable to the Arabs, who have consistently occupied this territory for over twenty centuries, in spite of the fact that throughout this period there was continuous minority Jewish presence in Palestine living peacefully side by side with Arabs.

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[18] See detailed discussion in Section II on the Balfour Declaration infra.

[19] I. Brownlie, Principles of Public International Law 156 (1979).

This legal position was sustained by the King-Crane Commission appointed in 1919 at the suggestion of Woodrow Wilson, ~~the~~ then U.S. President, to look into the underlying problems of the Palestinian political future. The Commission stated that "the initial claim, often submitted by Zionist representatives, that they have a "right" to Palestine based on an occupation of two thousand years ago, can hardly be seriously considered."[20]

Further evidence of the rejection of the Zionist claim of an "historical title" was revealed in the British House of Lords when it discussed the British Mandate over Palestine in 1922. This evidence, although not reflecting the official position of the British Government at the time, nevertheless reveals the real situation prevailing in Palestine during and after the tenure of the mandate. During debate in the House of Lords, Lord Sydenham had this to say:

> I sympathise entirely with the wishes of the Jews to have a national Home, but I say that this National Home must not be given if it cannot be given without entailing gross injustice upon other people. Palestine is not the original home of the Jews. It was acquired by them after a ruthless conquest, and they have never occupied the whole of it, which they now openly demand. They have no more valid claim to Palestine than the descendants of ancient Romans have to this country. The Romans occupied Britain as long, or nearly as long, as the Israelites occupied

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[20] King-Crane Commission Report, August 28, 1919. Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference, 1919, 751 (1947).

> Palestine, and they left behind them in this country far more valuable and useful work.
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> If we are going to admit claims based on conquests thousands of years ago, the whole world will have to be turned upside down . . . . The only real claim to Palestine surely is that of the present inhabitants, some of whom descend from the pre-Jewish conquest population, and others from Israelites converted to Islam.[21]

As a matter of fact, the Balfour Declaration was never approved by both Houses. On a motion declaring the Palestine mandate, which had included provisions of the Balfour Declaration to be unacceptable in its present form in the House of Lords, on June 21, 1922, it was carried by 60 to 29 votes[22] and the House of Commons subsequently defeated a motion seeking approval of the mandate. Attacking the proposed mandate, Lord Islington said that it directly violated the pledges made by His Majesty's Government to Palestine, since the mandate:

> If ratified, it imposes on this country the responsibility of trusteeship for a Zionist political predominance where 90 percent of the population are non-Zionist and non-Jewish . . . . In fact, very many orthodox Jews, not only in Palestine but all over the world, view with the deepest misapprehension, not to say dislike, this principle of a Zionist Home in Palestine. The scheme of a Zionist Home must, and does, entail direct Jewish bias as against the people of the country, who are mainly Arabs and Mohamedans. And it not merely introduces this influence by utilizing the Jewish forces within the territory of Palestine, but it brings about this influence by importing into the country extraneous and

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[21] 50 Parliamentary Debates, House of Lords 1021 (21 June 1922).

[22] Ibid. 1034.

> alien Jews from other parts of the world, in order to make the predominance effective . . . . I venture to say that Zionism, as it is now in practice in Palestine, is really the antithesis of the true principles embodied in the mandatory system.[23]

Therefore, the Balfour Declaration as a government policy was rejected although the Mandate agreement over Palestine between Great Britain and the League of Nations changed the situation.

However, it is also admitted by one Jewish account, that Jews of the twentieth century are mostly converts to Judaism and have no racial link with the Israelites or Hebrews who lived in Palestine more than two thousand years ago. This account, doubtful as it may appear, denies the existence of present-day Jews as a race[24] and argues that very few of them have any connection with Palestine. It adds:

> The Jews of Palestinian origin constitute an insignificant minority. Like Christians and Moslems, the Jews have engaged with great zeal in the conversion of people to their faith . . . . Jewish proselytism was not less active in Asia, in the whole of North Africa, in Italy, in Spain and in Gaul. Converted Romans and Gauls no doubt predominated in the Jewish communities mentioned in the chronicles of Grégoire de Tours. There were many converted Iberians among the Jews who

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[23] Ibid. 998-999.

[24] See also Dinstein who argues that "it is not fortuitous that one of the most controversial--and politically explosive--questions in the life of the State of Israel has been 'who is a Jew?' (in the ethical, in contradistinction to the religious sense) rather than, 'who is an Israeli?'" Y. Dinstein, "Collective Human Rights of Peoples and Minorities," 25 Int'l & Comp. L. Q. 104 (1978).

> were expelled from Spain by Ferdinand the Catholic and who spread to Italy, France, the East and Smyrna. The great majority of Russian, Polish and Galician Jews descended from the Khazars, a Tartar people of Southern Russia who were converted in a body to Judaism at the time of Charlemagne. To speak of a Jewish race, one must be either ignorant or of bad faith. There was a Semitic or Arab race; but there never was a Jewish race.[25]

However, according to another source, the term "race" wherever it appears:

> . . . is used not in its anthropological or biological sense, but as descriptive of a group of human beings who are associated and linked by common history, religion, culture, tradition and language.[26]

Be that as it may, it would appear that the Jewish historical claim of right over Palestine was a biblical episode which came to an end centuries ago. However, despite traditional Jewish and Arab claims for Palestine, in view of the Balfour Declaration and the subsequent British Mandate, the early history would probably seem to hold no substance any longer for either of the two contending groups.

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[25] Joseph Reinach, a French politician of Jewish origin, translation from Journal des Débats, 30 March, 1919, cited by Cattan, op.cit. 10.

[26] N. Feinberg, "The Recognition of the Jewish People in International Law," The Jewish Yearbook of International Law 6 (1948).

Section II: The Balfour Declaration

Background to the Balfour Declaration

The Balfour Declaration which the state of Israel cites to have enabled Jewish immigration to Palestine was promulgated by the British government on November 2, 1917[27] and later concurred by the Allied and Associated Powers. This Declaration was a product of mounting Zionist pressure on the British government since the first Zionist Congress in 1897, which planned to obtain a political and juridical basis for the foundation of a Jewish state.[28] Formal negotiations between Zionist leaders and British authorities began in early 1917, although there had been informal contacts between both sides as early as 1902.[29] Great Britain, being an imperial power, was considered to be in a strategic position to carry through the Zionist ambition of securing a national home for the Jewish people in Palestine. Also, the Ottoman Empire had proved favourable to the idea at that time.

When formal negotiations began, Britain had two principal objectives. The first was to win the war, and the second was to maximize Britain's power position through the ensuing peace settlement.[30] To realize these objectives, the Zionists supported the British government to win the war, while in return they were promised to secure a public law authority for their territorial ambitions.

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[27] Reproduced from the original in the archives of the British Museum by J.N. Moore, The Arab-Israeli Conflict (Vol. 3) 32 (1974).

[28] Taylor, Prelude to Israel: An Analysis of Zionist Diplomacy, 1897-1947 3-6 (1959); Sokolow, op.cit. 268-72.

[29] Taylor, ibid. 7.

There was a noticeable difference in approach towards the foundation of a Jewish state between the Zionists who were even prepared to fight civil war and the Anglicized Jewry who had largely joined the British establishment and were in a minority, or soon to become such. While the former pressed for foundation of a state, the latter were pressing for protection of existing equality of rights. The Anglicized Jews had a feeling that Zionism was threatening their involuntary inclusion in the proposed "Jewish People" nationality constituency, and they apprehended the Zionist position of looking at Palestinian Arabs as either a non-people or people with no rights worthy of consideration. Unlike the Zionists, they regarded themselves as having a moral obligation to attempt to protect Palestinian Arabs should their rights be compromised by Zionists.[31]

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[30] Stein, The Balfour Declaration 126 (1961).

[31] W.T. Mallison et al., The Palestine Question in International Law and World Order 30 (1986).

The British government policy was also not in favour of antagonizing Arabs in Palestine should they separate from Ottoman Turkish rule in the event of successful completion of the war, although it lacked consistency in spite of several assurances made to the Arabs that their rights would be protected. The most remarkable assurance was the one made in the McMahon-Hussein correspondence of 1915-1916[32] in which the Arab government pledged, inter alia, to grant preferential treatment to Britain in matters related to economic enterprises, while in return Britain would recognize and support the independence of Arabs in all regions demanded by the Sherif of Mecca. In the letter from the British High Commission in Cairo to the Sherif of Mecca, the latter was given the following assurance from the British government:

> I am convinced that this declaration will assure you beyond all possible doubt of the sympathy of Great Britain towards the aspirations of her friends the Arabs and will result in a firm and lasting alliance, the immediate results of which will be the expulsion of the Turks from the Arab countries and the freeing of the Arab peoples from the Turkish yoke, which for so many years has pressed heavily upon them.[33]

The assurance made no specific mention of Palestine, but since it was meant to embrace all Arab peoples under Turkish yoke, the Arabs of Palestine were included _mutatis mutandis_. Later the British government denounced MacMahon's pledge that the whole of Palestine west of Jordan was included in this assurance and therefore could not form a just basis for the claim that Palestine should be converted into an Arab state.[34] But this renunciation, coming more than twenty years later, could mean nothing more than confirming British inconsistent policies toward the whole Palestinian question.

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[32] Cmd 5957, 3-18 (1939) 27 Parliamentary Publications, House of Commons, (1938-39).

[33] Letter from Sir Henry MacMahon to Sherif Hussein of Mecca, October 24, 1915, ibid.

The Balfour Declaration in favour of the Jewish people to have a home in Palestine was introduced by a sentence describing the declaration as one of "sympathy with Jewish aspirations which has been submitted to, and approved by, the Cabinet." This initially appeared to have been a defeat for Zionists who had pressed for a declaration of commitment to the foundation of a Jewish state, instead of a mere home in Palestine. However, even with this bare humanitarian declaration, the events which followed after 1917 seemed to have favoured Zionist aspirations. In its mild form, the Balfour Declaration provided that:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and

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[34] Cmd 6019 (The Palestine Statement of Policy: The British White Paper, May 17, 1939).

> religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[35]

Legal Aspects of the Declaration

The legality of this Declaration is highly questionable because it raises a lot of issues. In the first place, the British government, although capable of making a declaration of policy, lacked capacity of title to the territory which was promised to the Jewish people. Until that policy was brought into fruition by the Palestine Mandate, the declaration was an empty promise and not enforceable. The existence or non-existence of a title to territory depends upon the existence of certain facts which the law recognizes as creating a right. The law requires the existence of corpus as well as animus[36] ultimately leading to actual effective control of land or territory. At the time that the British government made a promise to the Jews, it had no possession of any part of land in Palestine and, since a statement of policy--particularly an assurance given after events--is tantamount to basic elements of a [treaty],[37] the Balfour Declaration was void insofar as the British government had no title to territory in Palestine. As observed in the Island of Palmas case:[38]

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[35] See note 27 supra.

[36] Lord Stowell in The Fama 5 C. Rob. at p. 115: "All concur . . . in holding it to be a necessary principle of jurisprudence, that to complete the right of property, the right of the thing and possession of the thing itself should be united . . . . This is the general rule of property and applies, I conceive, no less to the right of territory than to other rights." Cited by R.Y. Jennings, The Acquisition of Territory in International Law 4 (1963).

> . . . practice, as well as doctrine, recognizes--though under different legal formulae and with certain differences as to the conditions required--that the continuous and peaceful display of territorial sovereignty is as good as a title . . . . Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a state was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between states.

Therefore, as far as Palestinian territory became an issue after the Balfour Declaration, Great Britain, although anticipating future acquisition of rights of disposal or administration, until such a time lacked a title erga omnes to the territory and therefore her promise to the Jewish people was nothing but a policy statement made presumably in good faith. Moreover, the maxim nemo dat quod non habet[39] which is undoubtedly part of international law, applies squarely to Great Britain, that it could not offer any better title to the Jewish people than it possessed.

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[37] J. Lador-Laderer, "Legal Aspects of Declarations," 12 Israel Law Review 215 (1977).

[38] Per Judge Huber, Permanent Court of Arbitration, No. XIX, (1928) 2 R.I.A.A. 829.

[39] Or, nemo plus juris transferre potest quam ipse habet: no man can give another any better title than he himself has.

To quote Judge Huber again in the Island of Palmas case on this principle, he stated:

> The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region . . . . It is evident that Spain could not transfer more rights than she herself possessed.[40]

Although the effect of this principle is reduced by the operation of the doctrines of prescription, acquiescence and recognition,[41] still they could not apply to Great Britain which had not occupied Palestine. In the words of one commentator:

> The most significant and incontrovertible fact is [however] that by itself the (Balfour) Declaration was legally impotent. For Great Britain had no sovereign rights over Palestine; it had no proprietary interest; it had no authority to dispose of the land. The Declaration was merely a statement of British intentions and no more.[42]

Be that as it may, a liberal interpretation of the Declaration, at least to the events which followed after 1917, should take into account the views expressed by the then acknowledged leader of the Arabs, Emil Feisal, who as head of the Arab delegation at the Paris Peace Conference in 1919 addressed a letter to a member of the American

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[40] (1928) 2 R.I.A.A. 829 at 842.

[41] Brownlie, op.cit. 156 et seq.

[42] S.M. Linowitz, "An Analysis of a Tenderbox: The Legal Basis for the State of Israel," 43 American Bar Association Journal 522-523 (1957).

Zionist deputation promising to help the Zionist movement to secure a home in Palestine.[43] On the same day, Feisal entered into an Agreement with the head of the Zionist movement, Chaim Weizmann, providing that:

> In the establishment of the Constitution and Administration of Palestine, all such measures shall be adopted as will afford the fullest guarantees for carrying into effect the British Government's [Balfour] Declaration of November 2, 1917.
>
> All necessary measures shall be taken to encourage and stimulate immigration of Jews into Palestine on a large scale, and as quickly as possible to settle Jewish immigrants upon the land through closer settlement and intensive cultivation of the soil. In taking such measures the Arab peasant and tenant farmers shall be protected in their rights and shall be assisted in forwarding their economic development.[44]

The Feizal-Weizmann agreement was a restatement of Feizal's policy probably reflecting Palestinian wishes at the time and, since it reflected the safeguard clause protecting the Palestinian rights in the Balfour Declaration, it then follows that Palestinian rights should have taken precedence over those of would-be Jewish immigrants in Palestine in order to preserve the Arab's status quo ante.

Moreover, the fact that the Palestinians had no direct negotiating role leading to the Balfour Declaration, it should have been recognized that the first safeguard was protective of their rights which a fortiori should have been effectuated according to elementary principles of justice. This is a legal position adopted in the Cayuga Indians Case (Great Britain v. United States)[45] in which the Indians, the beneficiaries of a covenant, had no effective role in framing the said covenant. The tribunal in determining their claims arising from a dispute, emphasized the "universally admitted principles of justice and right dealing as against the harsh operation of the legal terminology of a covenant which the convenantees had no part in framing and no capacity to understand.[46] Having made this finding, the tribunal rested the Cayuga Indians Case upon the strict legal basis of Article IX of the Treaty of Ghent (United States and Great Britain)[47] which was construed as a promise to restore the Cayugas in Canada, who claimed to be a tribe or nation and had been in the war as such, to the position in which they were prior to the division of the nation at the outbreak of the war. The same interpretation would have been extended to the Balfour Declaration when it was inserted in the British Mandate for Palestine.

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[43] C. Weizmann, Trial and Error 245-6 (1949).
[44] Ibid. 247.

The Declaration also seems to be a humanitarian document in which the British government was merely expressing support to Jewish people without making any serious commitment. This is indicated by wishful words such as the British government view "with favour" the national home "in Palestine" and that the government "will use their best endeavours." These words do not specify any legal obligation at all and therefore it is not surprising to find that the declaration was disputed by lawmakers as not having intended creation of rights for the Zionists when a motion was moved in the House of Lords to incorporate it in the Palestinian Mandate.[48] It was defeated on the grounds that it violated the government's pledge to the Palestinian people and was inconsistent with Article 22 of the League of Nations Covenant which had laid down the fundamental principles of the Mandatory System.

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[45] (1926) 6 R.I.A.A. 173.

[46] Ibid. 183.

[47] Treaty of Peace between Great Britain and the United States, signed at Ghent, 24 December, 1814. C. Parry, 63 Consolidated Treaty Series 421.

This was followed by a Statement of Policy in which the British government declared that the interpretation which His Majesty's Government placed upon the 1917 Declaration:

> . . . need not cause alarm to the Arab population of Palestine . . . . His Majesty's Government have not contemplated . . . the disappearance or the subordination of the Arabic population . . . They would draw attention to the fact that the terms of the (Balfour) Declaration referred to do not contemplate that Palestine as a whole should be converted into a Jewish National Home, but that such a Home should be founded in Palestine.[49]

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[48] See Lord Islington's comments note 22 supra.
[49] Cmd 1700 at 18.

The Balfour Declaration later received an ex post facto validation in the British Mandate for Palestine[50] by the Allied Powers, but until such time, as was once admitted by an Israeli spokesman at the United Nations, "its precise legal status at the time it was made may be open to discussion."[51]

Section III
The British Mandate for Palestine

History of the Mandate

The history of the British Mandate for Palestine goes back to the events which took place after World War I.

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[50] The Preamble to the Mandate provides that: ". . . Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2, 1917, by the Government of His Britannic Majesty and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people . . . . Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country . . . .

Article 4 provides, inter alia., that: "An appropriate Jewish agency shall be recognized as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine and, subject always to the control of the Administration, to assist and take part in the development of the country." M.O. Hudson, 1 International Legislation 111.

[51] Cited in J.W. Halderman (ed.), The Middle East Crisis 48 (1969). See also N. Feinberg, On an Arab Jurist's Approach to Zionism and the State of Israel 22-25 (1971).

It was decided after the war that all territories which were under German and Turkish rule would be brought under a mandate system with international supervision.[52] This decision formed part of Article 22 of the League of Nations Covenant[53] which provided, inter alia, that:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The Mandate was therefore created in the interests of the inhabitants of the territory and of humanity in general, as an international institution with an object of sacred trust of civilization. As regards Palestine, which in particular was under Turkish rule then, Article 22 of the Covenant made it clear that:

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[52] By Article 119 of the Versailles Treaty (June 28, 1919), Germany renounced her colonies in favour of the Principal Allied and Associated Powers, but she did so conditionally, the condition being that set out in Article 22 of the Treaty, namely that these colonies would become mandates. Under Article 16 of the Treaty of Lausanne, Turkey simply renounced her rights to territories outside the frontiers laid down in the treaty, "the future of these territories and islands being settled or to be settled by the Parties concerned." However, the Covenant of the League of Nations did not form part of the Lausanne Treaty as it did in the case of the other peace treaties.

[53] Parry, 225 The Consolidated Treaty Series 2203 (1919).

> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Great Britain was offered the Palestinian Mandate by the Supreme Council of the Principal Allied and Associated Powers meeting at San Remo on April 25, 1920, and her draft Mandate was confirmed by the Council of the League of Nations on July 24, 1922,[54] amidst opposition by the Palestinian Arabs who were already apprehensive of British policy toward Palestine as it appeared to favour the Jewish people more than the Arabs.[55]

The apprehension of Palestinian Arabs against Jewish occupation of Palestine assisted by the British[56] became more apparent when it was provided in the mandate that a Jewish national home would be established in Palestine as a measure of putting into effect the Balfour Declaration.[57] The Arabs protested strongly against the mandate, because it impaired their rights as original inhabitants of Palestine. The Mandate had provided under Article 6 that: "The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions . . . ."

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[54] Hudson, 1 International Legislation 109.

[55] King-Crane Commission Report, op.cit., note 20 at 787.

[56] See the concern expressed by both the House of Commons and House of Lords on the proposed mandate, notes 22 and 23 supra.

[57] Article 2 of the Mandate for Palestine provided that: "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."

Underlying the mandate's policy was the assumption that those rights would not conflict but, rather, that Arab and Jewish interests would join together in peaceful development for mutual benefit. However, as the Palestine Royal Commission reported in 1937:

> It must have been obvious from the outset that a very awkward situation would arise if that basic assumption should prove false. It would evidently make the operation of the Mandate at every point more difficult, and it would greatly complicate the question of its termination. To foster Jewish immigration in the hope that it might ultimately lead to the creation of a Jewish majority and the establishment of a Jewish State with the consent or at least acquiescence of the Arabs was one thing. It was quite another to contemplate, however remotely, the forcible conversion of Palestine into a Jewish State against the will of the Arabs. For that would clearly violate the spirit and intention of the Mandate System. It would mean that national self-determination had been withheld when the Arabs were a majority in Palestine and only conceded when the Jews were a majority. It would mean that Arabs had been denied the opportunity of standing by themselves: that they had, in fact, after an interval of conflict, been bartered about from Turkish sovereignty to Jewish sovereignty.[58]

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[58] Palestine Royal Commission (The Peel Commission) Report, 41-42 (1937), Cmd 5479.

The appointment of the Royal Commission was in response to a volatile situation which had been developing in Palestine since 1920. The ambiguity of the Balfour Declaration which never specified the nature of a Jewish homeland in Palestine and the League Mandate thereafter led to increasing strife between Arab and Jewish communities in Palestine, each of which interpreted the ambiguity to support its vision of the future of Palestine. Jews interpreted the mandatory obligation as leading toward a Jewish State while Arabs, on the other hand, interpreted the obligation as creating only a Jewish national home within Palestine. These differences and resentment of continued Jewish immigration and settlement in Palestine had provoked Arab riots in Palestine in 1920-21, 1929, 1933 and 1936-38. It was following the Arab revolt of 1936 that the Royal Commission, chaired by Lord Peel, was appointed and its report in 1937 contended that the Arab desire for national independence and their opposition to the establishment of a Jewish national home in Palestine were the principal causes of the rioting. The Commission recommended the partition of Palestine into separate Arab and Jewish States, owing to the irreconcilable Arab and Jewish positions under the terms of the mandate. The recommendation for partition was opposed by the Arabs and, although the Jewish Agency approved the fundament of partition, its particulars were opposed. With the opposition from both the Arabs and Jews, the Commission's recommendation fell short of adoption. The reaction from the League of Nations Mandates Commission concerning the problem of Palestine was not encouraging either. In its Report following publication of the Royal Commission Report, the Mandates Commission excluded the setting-up of two independent states, but left open other solutions to be borne in mind at the appropriate moment.[59]

The history of the mandate was therefore one of increasingly widespread conflict between the Arabs and Jews. In this atmosphere of animosity, the development of self-governing institutions in Palestine as provided under Article 3 of the Mandate proved impossible, save for the Jewish Agency which encouraged Jewish immigration into Palestine. Otherwise, Palestine was governed and administered from the beginning to the end directly by the British government as if it were a colonial possession. This state of affairs was engendered partly due to the uncooperative attitude of the Arab population toward the British administration. The 1930 British White Paper (The Passfield White Paper)[60] referred to the consistent refusal of representative Arab leaders in Palestine first to reconstitute a nominated Advisory Council formerly established in 1920, and secondly by refusing a proposal for the formation of an Arab Agency. It was intended that this agency should have functions analogous to those entrusted to the Jewish Agency by Article 4 of the Palestine Mandate. Under this Article, the Jewish Agency was:

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[59] Report of the League of Nations Permanent Mandates Commission to the League Council. League of Nations Doc. C. 170.M.100.1939.VI Geneva, June 29, 1939, paragraph 15, in Moore (ed.), The Arab-Israeli Conflict, (Vol. III) 229 (1974).

[60] Cmd 3692, Great Britain House of Commons Sessional Papers, Vol. 16 at 12-23 (1930-31).

> . . . recognized as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish National Home and the interests of the Jewish population in Palestine, and subject always to the control of the Administration, to assist and take part in the development of the country.

The Jewish Agency was also recognized by the Permanent Court of International Justice in the Mavromatis Palestine Concession Case[61] in which it expressed the opinion that "the Jewish Agency is in reality a public body, closely connected with the Palestine administration."

After a long and frustrating series of fruitless attempts to reconcile the interests of both the Arabs and Jews in Palestine, in 1939, the British government resolved to continue the responsibility for the government of the whole of Palestine, inter alia, establishing an independent Palestine within ten years in which both Arabs and Jews share in government in such a way as to ensure that the essential interests of each community are safeguarded.[62] When the Permanent Mandates Commission considered the British government's proposal, it found that its relevance would be borne in mind in attempting to find a lasting solution for the Palestine problem at the appropriate time.[63]

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[61] Publications of the Court, Series A, No. 2 at 21.

The Palestine problem was submitted to the United Nations in 1947, Britain making it clear that she would not continue as Mandatory past the following year.[64] The Arab states (Egypt, Syria and Lebanon) immediately raised the legal question connected with the validity of the mandate and proposed that it first be submitted to the International Court of Justice for an Advisory opinion. The legal issue regarding the validity of the mandate to be referred to the Court was formulated as follows:

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[62] This policy was adopted after detailed discussion of proposals contained in the White Paper (The MacDonald White Paper) of May 17, 1939, Cmd. 6019 at 2-12 (1939).

[63] League of Nations Permanent Mandates Commission, minutes of the thirty-sixth session held at Geneva from June 8th to 29th, 1939. L.N. Doc.C.170.M.100.1939.VI (Geneva, June 29, 1939) at 274-75. Also in Moore (ed.), loc.cit. note 58 supra.

[64] On April 2, 1947, the head of the United Kingdom delegation to the United Nations sent a letter to the Acting Secretary General, requesting on behalf of the Government of the United Kingdom that the question of Palestine be placed on the agenda of the next regular session of the General Assembly. The letter stated: "His Majesty's Government in the United Kingdom request the Secretary General of the United Nations to place the question of Palestine on the agenda of the General Assembly at its next regular Annual Session. They will submit to the Assembly an account of their administration of the League of Nations Mandate and will ask the Assembly to make recommendations, under Article 10 of the Charter, concerning the future Government of Palestine.

"In making this request, His Majesty's Government draw the attention of the Secretary General to the desirability of an early settlement in Palestine and to the risk that the General Assembly might not be able to decide upon its recommendations at its next regular annual session unless some preliminary study of the question had previously been made under the auspices of the United Nations. They therefore request the Secretary General to summon, as soon as possible, a special session of the General Assembly for the purpose of constituting and instructing a special committee to prepare for the consideration, at the regular session of the Assembly, of the question referred to in the preceding paragraph." U.N.Y.B. 276-77 (1946-47).

> Whether the provisions of the Mandate for Palestine regarding the establishment of a Jewish National Home in Palestine are in conformity or consistent with the objectives and provisions of the Mandate relating to the development of self-government and the preservation of the rights and position of the Arabs of Palestine.[65]

This recommendation, originally formulated by the Ad Hoc Committee on the Palestine Question was rejected by the General Assembly[66] and the issue was not pursued further.

Critique to the Mandate

British policies pursued inside Palestine were completely different from the provisions of the mandate, partly because of neglecting the interests of the Palestinian Arabs which were supposed to be safeguarded. According to the opinion of the International Court of

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[65] Official Records of the 2nd Session of the General Assembly, Ad Hoc Committee on the Palestine Question. U.N.Y.B. 241 (1947-48).

[66] Defeated by a vote of 25 to 18 with 11 abstentions. U.N.Y.B., *ibid.* at 245.

Justice in the South-West Africa Case,[67] the original intention of the Mandate system:

> . . . was [created] in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object--a sacred trust of civilization.

It is the violation of this security trust of assisting to civilize and prepare Palestinian peoples in the Mandated territory according to the provisions of the mandate which made actions of the Mandatory Power inconsistent with the spirit of the mandate. There are several grounds for this conclusion. First, the mandate system was in large part a substitute for colonialism and envisaged ultimate self-government, an idea which Article 22 of the League of Nations Covenant specifically addressed. Looking at the British policies inside Palestine during the tenure of the mandate, it seems that little effort was made toward leading Palestinian Arabs to self-government. Secondly, Britain did not take seriously the wishes of Palestinian Arabs, thus violating Article 22 of the Covenant which had provided that "the wishes of the communities must be a principal consideration in the selection of the Mandatory." This principal consideration, coupled with the proviso in the preamble of the mandate for Palestine, that nothing shall be done which may prejudice the civil rights of existing non-Jewish communities in Palestine, was largely ignored.

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[67] (1950) I.C.J. Reports (1950) 128 at 132.

The immediate conclusion is that the interests of the original inhabitants as conceived and protected by the Covenant of the League of Nations were neglected with the apparent acquiescence of the Permanent Mandates Commission. This neglect carries two legal consequences. The first consequence is that the mandate could not, at least in theory, impair or destroy the rights of the original inhabitants; but its implementation gravely injured their rights and status. Secondly, the mandate could not confer national rights on the Jewish immigrants which conflicted with the fundamental rights of the original inhabitants. By these consequences, damage to Palestinian rights was completed resulting in war between Jews and Arabs, another sign of failure on the part of one of the original purposes of the League of Nations, which was preservation of peace when the mandates system was conceived.

Section IV
The Partition of Palestine

Early Events Leading to the Partition Plan

The Palestine conflict between the Arabs and Jews escalated in 1947 to the point where the British government, realizing its inability to solve the conflict, referred the matter to the United Nations.[68] It requested the inclusion of the Palestine question in the Agenda of the second ordinary session of the General Assembly, specifying that the latter should, in accordance with the provisions of Article 10 of the Charter, make recommendations regarding the future status of Palestine. It also proposed the holding of a special session of the General Assembly for the purpose of constituting a special committee to make a preliminary study which the General Assembly would examine during its next ordinary session.

When the General Assembly finally met, it adopted two resolutions on May 15, 1947.[69] The first resolution created a Special Committee on Palestine consisting of eleven members[70] with powers to ascertain and record facts and to investigate all questions and issues relevant to the problem of Palestine. In its resolution 107, the Assembly called upon all governments and peoples, and particularly the inhabitants of Palestine to refrain from ". . . the threat or use of force or any other action which might create an atmosphere prejudicial to an early settlement of the question of Palestine."

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[68] See note 64 supra.

[69] Resolutions No. 106 and 107, U.N.Y.B. 247-56 (1946-47).

[70] Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Sweden, Uruguay and Yugoslavia.

Principles Governing U.N. Resolutions and Various Theories of the Charter

Before dealing with details of the Special Committee on Palestine and the subsequent Partition Resolution,[71] it is worthwhile examining principles governing resolutions of the United Nations and relevant theories of the Charter. The preamble proclaims the determination of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." By Article 12(1), the General Assembly may not act when the Security Council is exercising functions relating to the maintenance of international peace and security under Article 24.

The Security Council is empowered to apply sanctions--military measures or measures short of force--to the extent necessary for the maintenance of peace and security. If the Security Council determines the existence of threats to peace, breaches of peace and acts of aggression, it may make recommendations for settlement and, if necessary, decide upon measures appropriate to deal with the situation.[72] It is empowered under Article 42 to apply force if other measures prove inadequate to maintain or restore international peace and security. Force is supposed to be a means of the last resort, since dispute is primarily an inter-state responsibility and the Security Council would only have power to recommend procedure of settlement after the parties have failed to settle dispute by means of their own choice.

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[71] Resolution 181(II) of November 29, 1947, U.N.Y.B. 247-256 (1947-48).

[72] Articles 36, 37, 39 and 41 of the Charter.

The United Nations' history, however, shows the unwillingness of member states to carry out their legal obligations, especially those arising from Article 25 which provides that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." This is the reason why many resolutions of the Security Council in the Arab-Israeli conflict have passed unheeded by either party. Even where the Security Council is supposed to take action, it has rarely done so.[73]

Plan of Partition with Economic Union

Upon recommendations of the majority of the Special Committee on Palestine, the General Assembly adopted a resolution[74] on November 29, 1947, recommending the Plan of Partition with Economic Union. Under this plan, Palestine was to be divided into three parts: an Arab State, a Jewish State, and the Jerusalem area which was to be placed under an international regime administered by the United Nations. The whole of Palestine was to constitute an Economic Union.

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[73] Under Articles 41 and 42 of the Charter.
[74] See note 71 supra.

As a result of indications that the Arabs of Palestine and the surrounding Arab states would reject any plan envisioning partition of Palestine, the General Assembly proceeded to incorporate in its resolution the requests that:

> . . . (b) the Security Council consider, if circumstances during the transitional period require such consideration, whether the situation in Palestine constitutes a threat to the peace. If it decides that such a threat exists, and in order to maintain international peace and security, the Security Council should supplement the authorization of the General Assembly by taking measures, under Article 39 and 41 of the Charter, to empower the United Nations Commission, as provided in this resolution, to exercise in Palestine the functions which are assigned to it by this resolution; (c) the Security Council determine as a threat to the peace, breach of the peace or act of aggression, in accordance with Article 39 of the Charter, any attempt to alter by force the settlement envisaged by this resolution . . . .[75]

The Commission referred to was the U.N. Palestine Commission, which was given the function of implementing the Plan. The above-quoted paragraphs tended to convey the impression that the United Nations might undertake enforcement of the Plan as such, provided that the situation was deemed to constitute a threat to international peace. Violence escalated between Jews and

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[75] Khouri, op.cit., 47-48.

Arabs as a result of the partition plan, yet the Security Council did not take enforcement measures of any kind and, as a result, the Plan of Partition with Economic Union collapsed. It was hard to be enforced because the Security Council would not predict whether enforcing the Plan might require temporary or perpetual use of force in Palestine. This was a dilemma of which, in the words of an Indian delegation to the ensuing Special Session of the General Assembly:

> It had been said that any solution would require force, but this ignored the difference between the temporary employment of force to maintain law and order and the perpetual use of force to uphold an arrangement acceptable to the majority of the population. The only permanent solution could come through agreement.[76]

Indeed, it is not surprising that the General Assembly resolution for partition was not implemented. Being a recommendation, it could only be enforced by the Security Council since, according to the Charter,[77] the General Assembly is without power to do more than make recommendations in the handling of disputes.

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[76] U.N. G.A.O.R., 2nd Special Session, 1st Committee at 64 (1948), cited by Halderman, "Some International Constitutional Aspects of the Palestine Case," op.cit., 82.

[77] Articles 10 and 11 of the Charter.

Juridical Status of the Partition Resolution

As already pointed out, the Partition Resolution was merely a recommendation. Article 1 of the Charter, dealing with the purposes and principles of the United Nations, sets forth as the second of these the development of "friendly relations among nations based upon respect for the principle of equal rights and self-determination of peoples. Article 73, concerning non-self governing territories, provides that members of the U.N. which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government accept as "a Sacred Trust" the obligation "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions." Even though it is arguable whether Article 73 ever envisaged mandated territories to be within its purview as they were then governed by the League of Nations, UN member states were envisaged as potential trustees of these territories which, under the UN Trusteeship system, were to be guided by the principle of self-determination of peoples.

The General Assembly, by therefore recommending partition of the country against the will of the overwhelming majority of the Palestinian Arabs, made a flagrant violation of the principle of self-determination.

The majority of the General Assembly might have considered partition as a solution in response to the problem, as it was referred by the Mandatory Power that Palestine would no longer be governable "in its present political set-up," but this did not mean ignoring the wishes of the people concerned in striking a deal out of the impassé, as this would mean ignoring the "principle concern" behind the mandates set up.[78]

It is also doubtful whether the United Nations could confer title in Palestine because, the Organization did not assume the role of territorial sovereignty. According to Kelsen[79] and Brownlie,[80] "the resolution of 1947 containing a partition plan for Palestine was probably ultra vives and if it was not, was not binding on member states in any case." However,it would appear that member states, by subsequently recognizing the State of Israel and admitting it to the United Nations, condoned any previous illegality. Until then, Arab states did not contravene their Charter obligations when they responded to the will of Palestine Arab majority and rejected the partition plan, although by later resorting to force against Israel they were in breach of the Charter. The failure of the partition plan was generally a set-back for the United Nations because the impression had been created that it would be enforced if necessary and thus prevent the looming escalation of violence between Jews and Arabs.

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[78] See page 41 supra.

[79] H. Kelsen, The Law of the United Nations 195-7 (1951).

[80] Brownlie, op.cit. 176.

Section V: Establishment of the State of Israel and the 1948 War

Declaration of the State of Israel

One of the consequences of the General Assembly Partition Resolution was the establishment of the State of Israel. On May 14, 1948, the following declaration was issued in Tel Aviv:

> We members of the People's Council, representatives of the Jewish Community of Eretz-Israel and of the Zionist Movement, are here assembled on the day of the termination of the British mandate over Eretz-Israel and, by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly hereby declare the establishment of a Jewish State in Eretz-Israel, to be known as the State of Israel.[81]

The Declaration Has No Basis Under International Law

The alleged national and historic rights are fraught with ambiguity and controversy with no legal basis under international law.[82] As to the partition resolution, it has already been observed that the General Assembly could do no more than recommend a resolution[83] and that its recommendation was not accepted by an Arab majority in Palestine. Hence, it could not possibly be considered as a valid legal foundation for the statehood of Israel in 1948, in spite of recognition by existing states. Each state reserves exclusive right on recognition, and admission to the United Nations does not affect individual recognition. Recognition is governed by no rigid rules whatever; it is political in nature and the prerogative of an independent sovereign state.[84]

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[81] 1 Laws of the State of Israel 3 (1948).
[82] See section 1(b) supra.

Admission to the United Nations

The second consequence of partition following the declaration of Israeli statehood was her admission to the United Nations on the basis of the following factors as indicated in the relevant resolution of the General Assembly:

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[83] See section IV(c) supra. Various authors maintaining this position include: Nabil Elaraby, "Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements," 33 Law and Contemporary Problems 97 (1968); Henry Cattan, Palestine and International Law 42 (1976); Muhammad El-Farra, "The Role of the United Nations vis-a-vis the Palestine Question," 33 Law and Contemporary Problems 69-70 (1968); Institute for Palestine Studies, Beirut, The Palestine Question 85 (1968).

[84] P.M. Brown, "The Recognition of Israel" 42 A.J.I.L. 621 (1948).

> Noting furthermore the declaration by the State of Israel that it "unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them from the day when it becomes a Member of the United Nations."
>
> Recalling its resolutions of 29 November, 1947, and 11 December, 1948, and taking note of the declarations and explanations made by the representative of the Government of Israel before the ad hoc Political Committee in respect of the implementation of the said resolutions . . . .[85]

Since Israel undertook to fulfil her obligations under the Charter, this being conditional to her admission to the U.N., it was expected to respect and abide by all subsequent United Nations resolutions and fulfil every obligation arising therefrom. Ironically, this has not been the case and amounts to breach of trust. Moreover, as it is now argued that co-membership in the Organization amounts to recognition by other member states,[86] Israel's admission to the U.N. membership confirmed her status as a state and was therefore required under the Charter[87] to cooperate with the United Nations in carrying out resolutions of the General Assembly and Security Council.

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[85] G.A. Resolution 273(III), D.J. Djonovich, United Nations Resolutions (Vol. II) 263 (1948-49).

[86] D.P. O'Connell, 1 International Law (2nd ed.) 156 (1970). However, it has been argued that the mode and extent of recognition is done according to the exigencies of the situation. Recognition may be accorded for one main reason, that there is a fundamental principle of continuity of relations and therefore there can never exist a complete vacuum in international relations, an argument which counters co-membership as amounting to recognition. See Brown, op.cit. note 84 at 626.

[87] Article 4(1) of the Charter.

Recognition by Other States

Whatever might have been the illegality of procedure in the creation of the state of Israel, it was cured by recognition of other states. Under international law,

> To recognize a political community as a state is to declare that it fulfils the conditions of statehood . . . . If these conditions are present, the existing states are under the duty to grant recognition . . . . In thus acting, they administer the law of nations.[88]

Once this function has been exercised, there follows consequences of this recognition, principally, the capacity for the recognized state to enter into diplomatic relations, the right to sue in the courts of the recognizing state, and immunity from jurisdiction.[89]

Israel's admission to the UN was affirmation of her statehood and marked her debut into diplomatic relations with other states, although to date Arab states, except Egypt, do not acknowledge this fact. Publicists projecting the prevailing international law reject the position taken by Arab states toward Israel, arguing that:

> Admission to membership is prima facie evidence of statehood and non-recognizing members are at risk if they ignore the basic rights of existence of another state the object of their non-recognition.[90]

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[88] H. Lauterpacht, Recognition in International Law 6 (1947).

[89] Oppenheim, op.cit. 137-139.

[90] Brownlie, op.cit. 99.

Another account on the Palestinian problem argues that:

> Politics and not logic have dominated the solution to the problem, and the result is the rule that co-membership, even of the United Nations Charter allows membership only to states, and decision on membership would seem to be conclusive on the question of de facto statehood.[91]

The 1948 War

Immediately after proclaiming the state of Israel on May 14, 1948, the armies of neighbouring Arab countries crossed the Palestine borders in an attempt to nullify the partition resolution by launching aggressive war against the new state of Israel. This war was incompatible with Article 2(4) of the Charter that admonishes member states to refrain from use of force in their international relations. In preparation for the imminent war, the Jewish Agency had ordered a partial mobilization of the Haganah, an organization which had been operating for Jewish self-defence since 1920.[92] After fighting for a short period, it became clear that Israel was winning the war and thousands of Palestinian Arabs were fleeing their homes in fear.

The United Nations Security Council ordered a ceasefire by calling upon:

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[91] O'Connell, loc.cit.
[92] The Standard Jewish Encyclopedia, op.cit. 814.

> . . . all Governments and authorities without prejudice to the rights, claims or position of the parties concerned to abstain from any hostile military action in Palestine and to that end to issue a ceasefire order to their military and paramilitary forces to become effective within thirty-six hours . . . 22 May 1948.[93]

The Arab states defended the invasion of Palestine as a self-defence measure, although this agreement is untenable under Article 51 of the Charter, which entitles member states to self-defence only if an armed attack occurs against them individually or severally. Since the Palestine conflict was outside borders of the Arab states, they violated the Charter principle by invading Palestine.

Both sides eventually observed a one-month ceasefire which went into effect on June 11 under the supervision of the U.N. Mediator and the Truce Commission. Soon after the ceasefire, the U.N. Mediator undertook exploratory discussions with Arab and Israeli representatives on the future of Palestine and submitted to them his tentative proposals for a permanent settlement of the Palestine dispute. He proposed a Palestine Union embracing Trans-Jordan[94] to be set up and divided into two autonomous units, one Arab and the other Jewish. Each unit was to control its own affairs while overall cooperation on economic and defence problems was to be achieved through a Central Council. This plan, which altered the partition resolution boundaries of 1947 was found to be unsatisfactory and was rejected by both Arabs and Jews.[95] The Mediator successfully sought a prolongation of the truce to prevent a renewal of fighting and to provide more time for further mediation efforts.[96] Fighting broke out again in September of 1948, with Arab armies concentrating more on defensive than offensive actions because their military power had seriously declined in comparison to that of Israel during the truce period. Israel had firmly established political authority within her territorial boundaries and, once the truce ended, Israel was able to attack on several fronts simultaneously making substantial gains of territory from Arab countries. Until January,

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[93] Adopted by 8 votes in favour, with 3 abstentions (Syria, Ukrainian S.S.R., U.S.S.R.) U.N.Y.B. 422 (1947-48).

[94] Trans-Jordan became independent by the treaty of "friendship and alliance" between the United Kingdom and Trans-Jordan of March 22, 1946, which terminated the Mandate by formal recognition by the Mandatory Power of Trans-Jordan as a "fully independent state." Cmd 6779 (1949).

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[95] The Provisional Government of Israel stated that the proposals ignored the General Assembly resolution of November 29, 1947, as well as the outstanding fact of situation, namely the effective establishment of the sovereignty of the State of Israel within the area assigned to it by the General Assembly's resolution. The Arabs, in rejecting the Mediator's proposals, offered counter-suggestions providing for a unitary state in the whole of Palestine, and offering, in the Mediator's opinion, little or no compromise. U.N.Y.B. 432 (1947-8).

[96] Following the S.C. resolution of July 15, 1948, which read: "The Security Council, taking into consideration the telegram from the United Nations Mediator dated 5 July 1948, addresses an urgent to the interested parties to accept in principle the prolongation of the truce for such period as may be decided upon in consultation with the Mediator." U.N.Y.B., ibid. 434.

1949, when Egypt decided to enter armistice negotiations with Israel which was subsequently followed by other Arab states, their military position had become so critical that a continuation of hostilities would probably have brought about the loss of both more men and territories.

The war brought about three most serious consequences. It involved a far-reaching modification of the de facto United Nations partition plan which had envisaged the emergence of an Arab state. The territory allocated to that state was divided by the armistice agreements[97] between Israel, Jordan and Egypt. The city of Jerusalem, which was intended by the partition plan to be under special international regime, was divided between Israel and Jordan. The war also involved a major reshuffling of the population. Over 700,000 Palestinian Arabs who had lived in the area that came under Israeli control were displaced in the course of fighting; they ended up as refugees in Jordan, the Gaza Strip, Syria and Lebanon.[98]

The third consequence of the war was its crystallization of Arab states disunity, because of their different objectives over Palestine. Trans-Jordan wanted to secure for herself the portions of Palestine allocated to the Arab state by the partition plan, while Egypt, with Saudi Arabian backing, had sought to foil Trans-Jordan's plan by nullifying partition altogether or securing as much territory as possible for a client Palestinian Arab state.[99]

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[97] However, it was provided in the Armistice Agreements that armistice lines do not constitute international boundaries. See notes 104-107 infra.

[98] N. Safran, From War to War 34 (1969).

At the end of the war, the boundaries of the area under the control and jurisdiction of the Israeli government were different from those of Resolution 181(11).[100] In December of 1948, the Arabs requested that the Security Council discuss ways for implementing prior U.N. resolutions including that of November 1947, but without success. The victory gained by the Israelis in the second phase of the war made them uncompromising as they were in "no mood to wait for either world opinion or the U.N. to solve their problem," convinced that they could "win much more on the battlefield than at the peace table."[101] At the time of signing the armistice agreements with Egypt, Syria, Jordan and Lebanon, Israel possessed territory in excess of that allocated to it in the partition plan. Similarly, the Arab states, by resorting to force and occupying some of the territory envisaged as an independent Arab state by the partition plan, contravened the General Assembly partition resolution. Both Israel and Arab states, by acting in this way during the war, betrayed their solemn undertaking to uphold and carry out the Charter obligations.

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[99] Ibid. 35.

[100] Consequences of this war are generally discussed by Carnegie Endowment for International Peace, Israel and the United Nations 88-89 (1956).

[101] H. Sacher, Israel and the Establishment of the State 304 (1952).

Section VI: The Aim and Outcome of Armistice Agreements

The widespread military activity of 1948 and the Security Council ceasefire resolutions eventually led to negotiations leading to Armistice Agreements between Israel and Arab states in 1949. The essential features in these Agreements were, first, that no victor-vanquished relationship existed at the conference table, although the defeat of Arab armies in the field was not without influence on the results of the talks. Secondly, Israel negotiated with the three states individually so that each set of negotiations was only concerned with issues outstanding between Israel and one Arab state. Thirdly, the Acting Mediator did not force his own ideas on the parties; rather, he envisaged his task as being to guide them on the path that led to Agreement. Lastly, the secrecy in which the actual negotiations were conducted undoubtedly contributed greatly to the smooth course of the negotiations themselves.[102]

All negotiations were held pursuant to Security Council resolution of November 16, 1948, in which the Council:

> . . . decide[s] that in order to eliminate the threat to the peace in Palestine and to facilitate the transition from the present truce to permanent peace in Palestine, an armistice will be established in all sectors of Palestine.

The Israel government announced its acceptance of the principle of armistice negotiations on November 23, 1948, while Egypt, Jordan and Lebanon agreed on December, 1948, and, lastly, Syria on March 21, 1949.[103] Although the armistice machinery was intended to provide a transitional period by creating an atmosphere conducive to further negotiations eventually leading to formal peace treaties, and this point was stressed in all the texts of the Agreements between Israel and Egypt,[104] Israel and Lebanon,[105] Israel and Jordan,[106] and Israel and Syria[107]--that what was involved was armistice and not peace treaties, it may be argued, in view of the long period they have lasted, that they have hardened into peace treaties. Moreover, according to Security Council resolution of September 1, 1951, it was considered that the Armistice regime "is of a 'permanent character' since it has been in existence for nearly two and a half years and neither party can reasonably assert that it is actively a belligerent . . . .[108]

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[102] Carnegie Endowment for International Peace, note 100 supra at 84.

[103] D. Brook, Preface to Peace 15 (1964).

[104] 42 U.N.T.S. 251 no. 654.

[105] 42 U.N.T.S. 287 no. 655.

[106] 42 U.N.T.S. 303 no. 656.

[107] 42 U.N.T.S. 327 no. 657.

Apart from the United Nations Charter, the armistice agreements represented the only legal instrument until the Camp David Agreements,[109] regulating the relationship between Israel and the Arab states. This fact by itself implies that Arab states recognized the state of Israel because their agreements were negotiated under the United Nations auspices and later registered with the United Nations as "treaties." Only states, under the law of treaties,[110] can be parties to international treaties.

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[108] Security Council Resolution S/-2322, adopted by 8 in favour, none against with 3 abstentions (Soviet Union, China, India). U.N.Y.B. 299 (1951).

[109] See section three, chapter three.

[110] Article 2(a), Vienna Convention on Succession of States in Respect of Treaties, 17 I.L.M. 1490 (1978).

Provisions of Armistice Agreements

The main provisions in all the four armistice agreements are identical. They include suspension of hostilities on effective date and time, lines of demarcation, prohibited acts, prisoners of war, and consultative machinery.

Effective Date and Time

For an armistice to be effective, the time of commencement and the moment of termination have to be fixed beyond all possibility of misconception. All of the Arab-Israeli armistice agreements contain a provision that they were to come into force immediately upon signature,[111] although the moment of termination was left open. Failure to specify the moment of termination lends credit to the fact that they were probably intended to be permanent.

Demarcation Line

The purpose of a demarcation line between two belligerent forces is to prevent incidence which might lead to resumption of hostilities. It delineates a line beyond which forces of the respective parties cannot move. Demarcation lines in the Arab-Israeli armistices differed but were provided for in similar terms.[112]

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[111] Article XII(1) Israel-Egypt General Armistice Agreement; Article VIII(1) Israel-Lebanon; Article XII(1) Israel-Jordan; Article VIII(1) Israel-Syria.

[112] Article V (Israel-Egypt); Article IV (Israel-Lebanon); Article IV (Israel-Jordan); Article IV (Israel-Syria).

Prisoners of War

The 1929 Geneva Prisoner of War Convention provides that an armistice must, in principle, contain stipulations regarding the repatriation of prisoners of war.[113] It further provided that if, for some reason, the parties had been unable to include such a provision in their armistice, they would include a separate agreement on the subject and repatriation of prisoners shall be effected as soon as possible after the conclusion of peace.[114] The Arab-Israeli Armistice Agreements were concluded before the 1949 Geneva Prisoner of War Convention which went a step further, providing that prisoners of war should be "released and repatriated without delay after the cessation of active hostilities" and providing further that failing such a provision in the armistice, each Detaining Power must establish and execute without delay a unilateral plan of repatriation.[115] The Arab-Israeli armistices provided for release and exchange of prisoners immediately after signing the agreements under United Nations supervision.[116]

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[113] 118 L.N.T.S. 343 Article 75.

[114] Ibid.

[115] Geneva Convention Relative to the Treatment of Prisoners of War Article 118, 75 U.N.T.S. 135 (1950).

[116] Article IX(Israel-Egypt); Article VI (Israel-Lebanon); Article X (Israel-Jordan) - this one provides that an exchange of prisoners of war having been effected prior to the signing of the Agreement, no further arrangements are required except that the Mixed Armistice Commission shall re-examine whether there may be any prisoners of war which were not included in the previous exchange - Article VI (Israel-Syria).

Consultative Machinery

In an armistice agreement, it is generally desirable to provide for the establishment of a commission, composed of representatives of the opposing forces, to supervise the implementation of the armistice agreement. Each of the Arab-Israeli Armistice Agreements comprised a Mixed Armistice Commission to execute the provisions of the agreements.[117]

Violation of the Armistices

Although the armistice agreements contained several safeguards for cessation of hostilities, they were subsequently flouted by the parties in spite of the injunction mechanism contained in the agreements.
Article 1, paragraph 1, of each agreement prescribes that "the injunction of the Security Council against resort to military force in the settlement of the Palestine question shall henceforth be scrupulously respected by both parties." Also relevant is Article 1, paragraph 2, of each agreement, which stipulates that "no aggressive action by the armed forces--land, sea or air--of either party shall be undertaken . . . ." Hardly two weeks after the signing of the agreement between Israel and Egypt, the latter attacked Israel and both states launched long series of

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[117] Article X (Israel-Egypt); Article VII (Israel-Lebanon); Article XI (Israel-Jordan); Article VII (Israel-Syria).

armistice violations. Israel's armed columns advanced to the Gulf of Aqaba and occupied the vicinity of Bir Qattar. This illegal occupation was put before the Egyptian-Israeli Mixed Armistice Commission[118] and the Special Committee[119] which decided on March 20, 1950, that:

> The advance of Israel forces on 10 March 1949 to the Gulf of Aqaba area and the occupation of Bir Qattar is a violation of Article IV paragraphs 1 and 2 of the Egyptian-Israeli General Armistice Agreement.[120]

The Security Council, in examining this matter, further took note of the statement of the Government of Israel that:

> . . . Israeli armed forces will evacuate Bir Qattar pursuant to the 20 March 1950 decision of the Special Committee provided for in Article X, paragraph 4 of the Egyptian-Israel General Armistice Agreement, and that the Israel armed forces will withdraw to positions authorized by the Armistice Agreement.[121]

The Israeli forces subsequently withdrew from this area. Following this incident, the Egyptian Government imposed a blockade at the Suez Canal with respect to ships proceeding to Israel ports and later extended these measures to the Gulf of Aqaba.[122] The Egyptian government justified such measures by asserting that Palestine hostilities of 1948 constituted a state of war between Egypt and Israel, a condition which, according to Egypt, was not terminated by the signing of the armistice agreement; however, the Security Council rejected this position, arguing that, after the armistice agreements had been in existence for nearly two and a half years, neither party could reasonably assert to be actively belligerent.[123] Egypt consistently maintained that the armistice agreement merely ended active hostilities and therefore the international law of war rather than the international law of peace is applicable to Israeli shipping and that, accordingly, passage of Israel shipping into and through the Gulf of Agaba cannot be regarded as "innocent."[124] However, Egypt being a member of the United Nations, its alleged state of war was incompatible with the principles of the Charter.

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[118] Provided for under Article XI (Egypt-Israel).
[119] Provided in Article X(4) (Egypt-Israel).
[120] 5 UN SCOR 522nd meeting 2 (1950).
[121] S.C. Resolution 89 (1950).
[122] "Egyptian measures against Iraeli shipping in the Gulf were undertaken in the summer of 1950 when the Egyptian Government proceeded to install shore batteries near the tip of the Sinai Peninsula to command the entrance to the Gulf of Aqaba. From this point of vantage, control could be exercised over shipping in the Gulf of Aqaba and vessels could be prevented from passing to the emergent Israeli port of Elath." H.L. Hoskins, The Middle East 70 (1954).

The most serious violations of the armistice agreement between Egypt and Israel were perhaps the 1956 events.[125] On July 26, Egypt seized control of the Suez Canal and the assets of the Suez Canal Co., causing frenetic world-wide diplomatic activity punctuated chiefly by various threats directed toward Egypt with the aim of forcing her to relinquish control of the Canal. On October 25, Israel assured the Security Council that it would not start a war with its neighbours,[126] but on October 29 she attacked the Sinai Peninsula and occupied most of it by November 2.[127] At the same time, British and French troops invaded the Suez Canal after these countries had vetoed a Security Council resolution calling on Israel to withdraw behind the armistice lines and calling upon all members of the United Nations to refrain from giving any assistance to Israel so long as she did not comply. Subsequently, the General Assembly adopted a resolution[128] noting past disregard by both parties of the Arab-Israeli armistice agreements and the present Israel violation of the Egyptian-Israeli armistice agreement of 1949, and urging an immediate ceasefire and the withdrawal behind the 1949 armistice lines of the parties to the 1949 agreements. The United Nations was also critical of France and the Suez Canal invasion by the United Kingdom of Great Britain.[129]

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[123] Security Council Resolution S/-2322 of 1 September, 1951, note 108 supra.

[124] An editorial in the Egyptian Gazette of March 7, 1957, at 1, cited by C.B. Selak, "A Consideration of the Legal Status of the Gulf of Agaba," 52 A.J.I.L. 668 (1958).

[125] See generally L.C. Green, "Armed Conflict, War and Self-Defence," 6 Archiv des Völkerrechts 426-433 (1957).

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[126] 11 U.N. SCOR 745th meeting, 18 (1956).

[127] Israel gave its reason as the need "to eliminate the Egyptian fedayeen bases from which armed Egyptian units under the special care and authority of Mr. Nasser, invade Israel's territory for purposes of murder, sabotage and the creation of permanent insecurity to peaceful life." 11 U.N. SCOR 749th meeting, 8 (1956).

[128] G.A. Res. 997 (Emerg. Sess.) 11 U.N. G.A.O.R. Supp. 1 at 2, U.N. Doc. A/3354 (1956); D.J. Djonovich, V United Nations Resolutions 240 (1954-56).

[129] R. Higgins, U.N. Peacekeeping 1946-67, 227 (1969).

In the meantime, proposal for the creation of a UN peace-keeping force in the area between Egypt and Israel was in the offing. The General Assembly cannot lawfully create a peace-keeping force[130] but, following the wide range of disagreements in the Security Council at the time, the General Assembly did so under the Uniting for Peace[131] procedure. On October 30, 1956, the Security Council, by a simply majority with veto not operative, transferred the question of a U.N. force to the General Assembly.[132] On November 5, 1956, the General Assembly adopted a resolution approving the guiding principles for the organization and functioning of the United Nations Emergency Force (U.N.E.F.).[133]

U.N.E.F. was established as a peace-keeping force and not as an enforcement measure under Chapter VII of the United Nations Charter; hence it required the consent of the nations concerned in order to operate. In an aide-mémoire of November 20, 1956,[134] between Egypt and the United Nations, the former consented to the stationing of the force on her territory and undertook to exercise her sovereign rights on the basis of good faith, although in May of 1967 that faith was called into question when she unilaterally demanded withdrawal of U.N. forces from her territory before its tasks were completed. This step raised a number of legal issues, especially the breach of a promise to act in "good faith." Egypt defended her position by recalling U.N. resolution 1000 (ES-1), which established a United Nations Command for the Force "to secure and supervise the cessation of hostilities in accordance with all the terms" of resolution 997 (ES-1). However, according to her, she never made a binding commitment to the stationing of U.N.E.F. forces on her demarcation line. According to the then Egyptian Foreign Minister speaking in the General Assembly on November 27, 1956, after the publication of the "good faith" aide mémoire, he said:

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[130] See R. Higgins, "The Functions and Constitutional Bases of the United Nations Forces," in D. Bowett, United Nations Forces (1964).

[131] G.A. Res. 337(v) (1950).

[132] By a vote of 7 to 2 with 2 abstentions, see Higgins, U.N. Peacekeeping 1946-67 note 129 at 227.

[133] G.A. Res. 1000 (Emerg. Session), Djonovich, ibid.

[134] Higgins, U.N. Peacekeeping 1946-67 note 129 at 337.

> We shall believe that the General Assembly resolution of 7 November 1956 still stands, together with its endorsement of the principle that the General Assembly could not request the U.N.E.F. to be stationed or to operate on the territory of a given country without the consent of the Government of the country. This is the proper basis on which we believe, together with the overwhelming majority of this Assembly, that the U.N.E.F. could be stationed or could operate in Egypt. It is the only basis on which Egypt has given its consent in this respect.

He then added:

> . . . as must be abundantly clear, this force has gone to Egypt to help Egypt, with Egypt's consent, and no one here or elsewhere can

> reasonably or fairly say that a fire brigade, after putting out a fire, would be entitled or expected to claim the right of deciding not to leave the house.[135]

Israel on her part completely refused to allow the stationing of U.N.E.F. troops on her side of the line, despite the General Assembly resolution that "the scrupulous maintenance of the armistice requires the placing of the United Nations Emergency Force on the Egyptian-Israeli armistice demarcation line."[136] She pointed to the previous record of fedayeen raids from Egypt and the failure of Egypt to uphold the Security Council resolution of August, 1951, denying Egypt the exercise of belligerent rights in the Suez Canal against Israel. Israel also wanted guarantee of freedom of passage in the Straits of Tiran and Gulf of Agaba. The remaining major factor in Israel's relations with the U.N. in respect of U.N.E.F. was that she had denounced the Egyptian-Israeli Armistice Agreement, declaring it no longer applicable in light of the continuing violations of the same by Egypt.[137] In light of Israel's persistent refusal to consent to the stationing and operation of U.N.E.F. on its side of the line, it is even less possible to consider that Egypt's

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[135] G.A.O.R., 11th Sess., 597th Plenary para. 48-50; Higgins, ibid. 355-6.

[136] Resolution 1125(XI) of 2 February 1957. Djonovich, VI United Nations Resolutions 164 (1957-58).

[137] Higgins, op.cit. 386.

"good faith" declaration could constitute a limitation of its rights with respect to the continued stationing and operation of U.N.E.F. on Egyptian territory.

There were also disputes between Israel and Syria in 1951,[138] and between Israel and Jordan.[139] Briefly, these were the major armistice violations between Israel and Arab states, although over 100,000 incidents had been reported to the Mixed Armistice Commissions since 1949, and more were occurring daily before the Six Day War of 1967.[140]

The armistice agreements and the subsequent U.N.E.F. helped to restrict but not remove the possibility of direct war between Israel and Arab states. Rather than paving the way for a lasting peaceful solution to the Palestine problem, the armistices were viewed by Arab states as a temporary respite which could be cast aside any time should the war become imminent. Indeed, this is what happened in 1967 when Egypt and Israel confronted one another in the Six Day War. Until this war, the uncompromising position of both Arabs and Jews continued throughout the period following the signing of armistice agreements, with each side maintaining its position. The

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[138] Brook, op.cit. 32.

[139] Ibid. 43.

[140] R.H. Forward et al., "The Arab-Israel War and International Law," 9 Harvard Int'l Law Journal 242 (1968).

Arabs felt that Palestine was theirs and had been their homeland for many centuries, only to have it taken away and delivered to a foreign people. The Israelis felt that it had been promised them, had been occupied by them for eighteen years and by Jews before that, and had been won by them once and for all in 1948-49 when Israel formally became a sovereign state. These positions are almost diametrically opposed and appear to be irreconcilable.

In view of these facts, there is no doubt that the armistice agreements failed to prevent hostilities. Yet it may be argued that there would have been more friction without its presence. Equally important was the role of U.N.E.F. in reducing tensions between Egyptian and Israeli forces. The Security Council was also instrumental by acting as an appeals agency for disputes arising within the local armistice machinery. In spite of all failures, the armistice agreements assumed a very important role in limiting tensions between parties thereto. The 1973 war together with other important developments in the Arab-Israeli relations, including the 1979 Camp David Peace Accords, are considered in subsequent chapters.

Section VII:
The Palestinian Refugees

How Did the Problem Begin

The Palestinian refugee problem is part and parcel of the whole Arab-Israeli conflict, which came to a head in 1949 after adoption of the U.N. Partition Plan. Immediately after this plan, Arab states declared Jihad (holy war) against Israel with Arab riots against Jews spreading throughout Palestine.[141] At the beginning of the conflict, Arabs started attacking Jewish convoys destined for Jerusalem and outlying settlements, but when Jewish forces responded fiercely, the trend of the conflict changed in favour of the Haganah, the Israeli military wing.

The British began their withdrawal from Palestine in April of 1948, followed by Jewish and Arab forces ready to take over the cities and towns evacuated by the British. The Arabs started making voluntary evacuation of towns and villages, refusing to live for a single day under Jewish rule and declaring, "We do not recognize you and we shall return when you are no longer here."[142] At the end of the British mandate on May 14, there were already some 200,000

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[141] I.C. Sykes, Crossroads to Israel 395 (1965), cited by Radley, The Palestinian Refugees: The Right to Return in International Law 588 (1978).

[142] J. Kimche, A Clash of Destinies 122 (1960), cited by Radley, ibid.

Arab refugees,[143] and following the ensuing war between Israel and Arab states the majority of Palestine Arab community was swept away. According to one estimate, in Jewish controlled areas where 700,000 to 900,000 Arabs had lived, only some 170,000 remained with the number of refugees increasing as the conflict escalated.[144]

The state of war has already been examined elsewhere;[145] we examine here the refugee problem which was the direct outcome of the war and occurred in three phases. The first phase is that of *old refugees* who numbered about 1,200,117 registered with the United Nations Relief and Works Agency (U.N.R.W.A.) by December 31, 1965.[146] In the second category, there are *intermediate refugees* who include over 11,000 Arab inhabitants of the Demilitarized Zones between Israel and the neighbouring Arab countries. They were expelled by Israel after July 1, 1952, the deadline for registration under U.N.R.W.A., in order to qualify for relief assistance.[147] The third category of refugees comprises the victims of the 1967 war who, according to the Report by the Commissioner-General of U.N.R.W.A., comprised 234,000 Arab refugees from Jordan, Syria and the Sinai Peninsula following the June 5, 1967 crisis, in addition to 100,000 "old" refugees who fled their refugee camps (where they were registered with U.N.R.W.A.) when they were overrun by the Israeli army.[148] These figures have since been on the increase whenever Israeli troops clash with Palestinian guerrillas and the armies of Arab states.

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[143] Radley, *ibid.*

[144] D. Peretz, "Israel and the Palestine Arabs" 95 (1958), cited by Radley, *ibid.* 590, and cautions that exact figures do not exist but this provides a general idea.

[145] See fifth part of Section V supra.

[146] Report of the Commissioner-General of U.N.R.W.A., *U.N.Y.B. 219* (1965).

[147] *Ibid.*

Since 1949, a number of international instruments have been adopted to deal with the problem of displaced persons as a result of war or conflicts in their countries. While these instruments have one common feature of the right to return or repatriation of the victims after the conflict is over, the Refugee Convention of 1951 is an exception because it sought to resettle refugees somewhere else outside countries of their nationalities who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are unwilling to avail themselves the protection of that country.[149]

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[148] Ibid. 260 (1967).

[149] 189 U.N.T.S. 137: Article 1, para. A(2), Done July 28, 1951.

The Geneva Convention No. IV Relative to the Protection of Civilian Persons in Time of War of August 12, 1949

Although Geneva Convention No. IV[150] is directed specifically to the problem of protecting civilians in time of war, the Convention on the whole has very little to say on the question of post-war refugees. However, it applies to the Israeli occupied territories in so far as it contains a significant law-making provision designed to prevent the removal of protected persons so that they will not be in a position where they need to claim their right of return.[151] The relevant article provides that:

> Individual or mass forcible transfers as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or that of any other country, occupied or not, are prohibited regardless of their motive.[152]

This provision is important in the Palestinian situation where Israel applied various forcible means to uproot the Palestinian Arabs after the early voluntary exodus. There have been brutal and barbarous methods applied to Palestinian Arabs to remove them from their territory. Basically, "it seems that the principal Zionist leaders, both political and military, considered a massive Arab exodus to be desirable from the point of view of the future state."[153] Indeed, the fact that Israeli has persistently refused to allow exiled Palestinians to return to their homeland and continue to deport even those left behind, there is little doubt that Israel's long-term plans of creating a Jewish state might one day become a reality through systematic removal and killing of Palestinian Arabs.[154] The Geneva Convention is not applicable to the events of 1947-48 because, apart from coming into force on October 27, 1950, it was not ratified by Israel until a year later. Therefore, its provisions are examined only in regard to the general problem of the right of displaced civilians to return to their homes.

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[150] 75 U.N.T.S. 287.

[151] See detailed discussion on application of Geneva IV in Section 1, Chapter IV.

[152] Article 49(1).

The term "refugee" is found only in Article 44 and applies to refugees already existing at the start of hostilities. Consequently, the question of rights of Palestinian Arab refugees does not easily lend itself to analysis within the pattern addressed by Geneva Convention No. IV. However, Article 49, which prohibits the forced and permanent removal of persons from territory to which they are natives, could be applicable to the 1967 refugees.

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[153] Friedman, op.cit. 279.

[154] Israel has expelled approximately 2,000 Palestinians from Gaza and the West Bank over the past 21 years, representing an obvious inequality between the Israeli treatment of Jews from the world who are offered incentives to emigrate to Jewish settlements on the West Bank. Newsweek 30 (New York), May 23, 1988.

thereby binding the Israel government to allow them to return to their homes.

The Universal Declaration of Human Rights

Article 13(2) of the Universal Declaration of Human Rights[155] provides that "Everyone has the right to leave any country including his own, and to return to his country." The Declaration, although not binding, at least seeks self-obligation from states, since it "could be considered as an authoritative interpretation of the Charter"[156] and "commit all nations to the observance of human rights."[157] It is further argued that under this article states have to permit the return of their citizens or nationals only,[158] although in the Palestinian situation this kind of exception cannot apply because the Palestinian Arabs, being the original people of Palestine, have a right to return to their country notwithstanding the existence of the State of Israel which exercises discretion in granting citizenship and residence, a system which at best smacks of discrimination between Jews and Arabs eligible for Israeli citizenship.[159] In any case, the Universal Declaration of Human Rights has since become the basis of important decisions[160] taken by the United Nations in the field of human rights, including refugee matters.

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[155] Approved by G.A. Res. 217A(III), U.N.Y.B. 575 (1947-48).

[156] Rene Cassin, one of the Declaration's prominent draftsmen, A/C.3/SR-92, 12, cited by J. Lador-Lederer, "Legal Aspects of Declarations," 12 Israel Law Review 225 (1977).

[157] The Representative of China in the Third Committee, cited by Lador-Lederer, ibid.

[158] Radley, op.cit. 613.

Convention on the Status of Refugees

In determining the legal status of Palestinian refugees, there has been a problem of applying this Convention.[161] According to the term "refugee" in Article 1, paragraph A(2) of the Convention, the Palestinians are "unable" but not "unwilling" to return to the country of former habitual residence. The plight of Palestinians as refugees, according to the definition of the Convention, is that:

> . . . the Palestinians are truly refugees in a general sense; however, they are unique in their desire to return to their country of origin while the general political conditions that caused them to become refugees persist. Refugees usually have no desire to be repatriated, and typically, the concern of the refugee is the exact contrary

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[159] The 1950 Israel "Law of Return" grants every Jew in the world the right to claim Israeli citizenship and residence but not the Palestinian Arabs. Moreover, this is a contrast to approximately 2,000 Palestinians from the Gaza and West Bank who have been expelled by Israel from their Palestinian homeland. See note 154 supra.

[160] For example, the 1966 Human Rights Covenants, 6 I.L.M. 368 (1966) - Civil and Political Rights, 6 I.L.M. 360 (1966) - Economic, Social and Cultural Rights; the International Convention on the Suppression and Punishment of the Crime of Apartheid, 13 I.L.M. 50 (1973); Convention Against Racial Discrimination, annex to G.A. Res. 2106A(XX) of 21 December 1965, U.N.Y.B. 440 (1965).

[161] See note 149 supra.

> of repatriation--to receive asylum and protection against refoulement . . . .[162]

The definition therefore creates a dilemma to the Palestinian Arabs who do not constitute Convention refugees in regard to non-refoulement. The Refugee Convention affords protection after the flight of refugees with the aim of ensuring them to be accorded the same treatment as is generally granted to other aliens in a state, and that they be treated the same as nationals with respect to certain basic rights. Among these rights are those of non-discrimination (Article 3), freedom of religion (Article 4), acquisition of movable and immovable property (Article 13), the right to engage in wage-earning employment (Article 17), favourable housing (Article 21), public education (Article 22), and public relief (Article 23).

Generally the Convention focuses upon duties and obligations of the host country and enumerates a program of resettlement. Should it be applicable to the Palestinian refugees, it would cover only those choosing not to return to Palestine,[163] although many Palestinians in exile have always clamoured for return to their homeland. Arab countries in which Palestinian refugees find themselves have an international obligation to bear the primary responsibility for guaranteeing their rights in cooperation with the United Nations High Commission for Refugees (UNHCR) and the United Nations Relief and Works Agency (UNRWA). However, this attitude toward this responsibility has consistently been to encourage solution to the Palestinian problem so that the refugees could eventually return to their homeland.

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[162] Radley, op.cit. 611.

[163] G.S. Goodwin-Gill, The Refugee in International Law 57 (1983).

United Nations Resolutions

Since the displacement of Palestinian refugees in the 1947-48 war, the United Nations has adopted a number of resolutions calling upon Israel to allow Palestinian refugees to return home. The Progress Report prepared by the United Nations Mediator for Palestine[164] in 1948 under the heading "Right of Repatriation" stated, *inter alia*, that:

> The right of innocent people, uprooted from their homes by the present terror and ravages of war, to return to their homes, should be affirmed and made effective, with assurance of adequate compensation for the property of those who may choose not to return.[165]

In the same Report, the Mediator made a specific recommendation to the United Nations that:

> The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social

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[164] Appointed on May 14, 1948, pursuant to G.A. Res. 186 (II), *U.N.Y.B. 281* (1947-48).

[165] 3 U.N. G.A.O.R., Supp. 11 at 1-19, U.N. Doc. A/648, September 16, 1948, *U.N.Y.B.* note 164 at 304.

> rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations Conciliation Commission....

This recommendation did not create a new right but, rather, the Palestinian right to return was to "be affirmed by the United Nations." Consistent with this recommendation, on December 11, 1948, the U.N. General Assembly adopted resolution 194, paragraph 11, of which:

> . . . resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity should be made good by the governments or authorities responsible.[166]

Israel did not only disregard this resolution but also subsequently passed legislation providing for confiscation of lands of "absentee" Arab owners. In the three laws passed in 1948-49 (the Abandoned Areas Ordinance, the Absentee Property Regulations, and the Emergency Cultivation of Waste Lands Regulations), an "absentee" is defined as any person who was, on or after November 29, 1947 (the date of the U.N. Partition Resolution for Palestine):

> (a) a citizen or subject of any part of the Arab states;

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[166] 3 U.N. G.A.O.R. Res. 194(III) at 21 (1948), Djonovich, II Resolutions of the United Nations 85 (1948-49).

(b) in any of these states, for any length of time;
(c) in any part of Palestine outside the Israel-occupied area; or
(d) in any place other than his habitual residence, even if such place as well as his habitual abode were within Israel-occupied territory.[167]

A conquered, surrendered or deserted area was declared to be abandoned and sold by the Israeli Custodian to a Development Authority.[168]

For almost forty years now, the Israel government has failed to fulfil legitimate rights owing to Palestinian Arabs in spite of numerous U.N. resolutions[169] from 1949 until now, affirming and reaffirming those rights, regretting or deploring the non-implementation by Israel of previous resolutions. This stalemate notwithstanding, one of the questions arising therefrom is whether the Palestinian Arabs may be willing to live in peace with Israel if permitted to return to their homelands. Only the future events may eventually provide an answer.

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[167] Absentees' Property Law, 4 Laws of the State of Israel 68 (1950).

[168] S. Hadawi, Palestine, Loss of a Heritage 52 (1963).

[169] These resolutions are considered in considerable detail by Radley, op.cit. 603-608.

Prospects for Lasting Solution to the Refugee Problem

A lasting solution for Palestinian refugees cannot be sought in isolation of the whole Arab-Israeli conflict. In the first place, the Palestinian Arabs have themselves rejected the term "refugee" in the apparent belief that "refugeehood" and "nationhood" are mutually exclusive.[170] The implication of this belief is that admission of refugeehood amounts to waiver of their right to self-determination and therefore admission of settlement somewhere. It also gets Arab states out of any liability to support them and thus aggravate the complaints against Israel.

Resettlement would be in conformity to the international law of refugees and, had they agreed to it, this problem would probably be over by now. The only conclusion which can be made here is that the Palestinian refugee problem will be resolved conclusively only when Palestinian Arabs are granted their right to self-determination in a secure territory to decide everything by themselves and for themselves.

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[170] Ibid. 609.

CHAPTER III

ARAB-ISRAELI RELATIONS: FROM WAR TO DE FACTO PEACE

Section I: Foundation of the Palestine Liberation Organization (P.L.O.)

In January of 1964, the Arab League Summit Meeting in Cairo approved a proposal to support the establishment of a Palestinian national organization. Four months later, the Palestine Liberation Organization (P.L.O.) was founded at the first Palestinian National Congress which convened in Jerusalem in May, 1964, to formulate a political program for the liberation of Palestine.[1] Until then, the Palestinian liberation struggle had neither a clear political program nor a strong united front. There were numerous political parties each with a different political ideology and tactics. The first Palestinian Congress aimed at bringing together the various political parties under one umbrella so that they could speak with one voice. At its head was the Palestine National Council made up of representatives from all parties forming the P.L.O., trade unions and other groups. The Congress also established the

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[1] See Keesing's Reference Publication, Treaties and Alliances of the World 340 (1981); M. Curties et al. (eds.), The Palestinians 140 (1975).

P.L.O. Central Committee, the Palestine Liberation Army (P.L.A.), the Palestine National Fund, the Palestine Planning Board, and the Palestine Research Centre, as part of the P.L.O. framework.

Different P.L.O. Factions

The most important Palestinian organizations under the P.L.O. umbrella are El-Fatah; Popular Front for the Liberation of Palestine; Saiqa; Popular Democratic Front for the Liberation of Palestine; Popular Front - General Command; and Arab Liberation Front.

El-Fatah

This is the oldest and the largest of all the other organizations combined.[2] Fatah, an acronym formed by reversing the initial letters of Harakat Tahrir Filastin, i.e. Palestine Liberation Movement, was formed in 1959 with a political ideology of liberating Palestine through armed struggle. It began its military activities in 1965 from bases in Syria.[3]

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[2] Curties, et al. (eds.), ibid.

[3] G.E. Gruen, et al., The Palestinian in Perspective 52 (1982).

Popular Front for the Liberation of Palestine

This organization is an off-shoot of the Arab Nationalist Movement which was formed in the late 1940s during discussions among Arab students at the American University in Beirut.[4] The Popular Front for the Liberation of Palestine (P.F.L.P.) made its first appearance in November, 1967, with a Marxist-Leninist ideology. The organization's program is to apply armed struggle in the liberation of the whole of Palestine including the destruction of the state of Israel.[5]

Saiqa

The Saiqa organization was created in Syria in 1968. Its military strategy is application of violence in order to bring down the state of Israel. It is the second largest political grouping after Fatah in the P.L.O. family.[6]

Popular Democratic Front for the Liberation of Palestine (P.D.F.L.P.)

This is a small group which broke away from the P.F.L.P. in 1969. It adopted a Marxist ideology stressing the struggle toward creation of a Palestinian state and the complete annihilation of Israel.[7]

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[4] A.D. Miller, The P.L.O. and the Politics of Survival 19 (1983).

[5] Curties, op.cit. 141.

[6] Miller, loc.cit.

[7] Ibid.

Popular Front - General Command (P.F.-G.C.)

P.F.-G.C. was formed in 1968 after its leaders split away from Popular Front for the Liberation of Palestine (P.F.L.P.) for ideological reasons. It is a small group supported mainly by Syria and Libya with a political goal of intensifying military violence against Israel.[8]

Arab Liberation Front (A.L.F.)

This group is Iraq-sponsored and was formed in 1968 to counter other organizations which were prepared to accept some form of political arrangement in resolving the Palestinian struggle. Its main goal is to foment a war of national liberation inside Israel and the occupied territories.[9]

Palestine National Front (P.N.F.)

Formed in 1973, the Palestine National Front maintains a form of partnership with the Jordanian Communist Party and Fatah. It is only active among Palestinians of the West Bank and was almost liquidated by Israel in 1974 when its leaders were deported and its overwhelmingly communist activists jailed.[10]

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[8] Ibid. 142.
[9] Ibid.
[10] Ibid.

The P.L.O. National Covenant

The Palestinian National Covenant (Al-Mithaq Al-Watani Al-Filastini),[11] a quasi-constitution of the P.L.O. was adopted by the first Palestinian Congress which established the P.L.O. in May, 1964. It was amended by the Palestinian National Council in 1968 in order to accommodate political changes which had taken place in the Arab world following the devastating Six Day War of June, 1967.[12] The Covenant embraces, by and large, the P.L.O.'s strategic policy and fundamental aims in 33 articles. The articles fall into three main groups:

1. Articles 1-18 reiterate Palestinian claims by asserting the Arab claim to Palestine; define who a "Palestinian" is; assert the Palestinian obligation to liberate Palestine; and Palestinian interdependency with the Arab world. The articles include an appeal to all mankind to help the Palestinians in their struggle to liberate Palestine.
2. Articles 19-23 contain denial of Jewish rights, reject any compromise over Palestine and elaborate the intrinsic evil of Israel and its Jewish citizens.

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[11] Reprinted in J.N. Moore, The Arab-Israeli Conflict, Vol. III, 706-711 (1974).

[12] See detailed discussion of this war in Section II infra.

3. Articles 24-33 outline the functions of the P.L.O. to achieve the Covenant's aims, and assert that the liberation of Palestine cannot be subordinated to any other claim.

The legal character of the P.L.O. Covenant *alias* Charter is more than that of being an official P.L.O. policy document because of its norm creating function. Under Article 33, the Covenant provides that:

> Regulations, which shall be known as the Constitution of the Palestine Liberation Organization, shall be annexed to this Charter. It shall lay down the manner in which the Organization, and its organs and institutions, shall be constituted; the respective competence of each; and the requirements of its obligations under the Charter.

Jurisprudentially, the norm-creating function is essentially a political one[13] and the basic norm cannot rest upon another legal norm.[14] It would therefore appear that the Covenant is the highest law of the P.L.O. since the Constitution derives its existence from the Covenant. Moreover, since the basic norm is measured on the assumption that it is efficacious and P.L.O. activities have generally been conducted in conformity with the Covenant, its supremacy is undoubtedly obvious.

The Covenant's central tenet is total repudiation of Israel's existence. Israel's disappearance is implicit in the definition of Palestine as an attribute of both a people and a country. Article 1 provides that:

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[13] Lloyd & Freeman, *Lloyd's Introduction to Jurisprudence 324* (1985).
[14] *Ibid.* 323.

> Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation.[15]

Reference to the indivisibility of Palestine into an Arab and a Jewish state is emphasized in Article 2 providing that "Palestine, with the boundaries it had during the British mandate, is an indivisible territorial mandate." In light of this provision, it therefore follows that insofar as the P.L.O. struggle for self-determination is concerned, national liberation must redeem total Palestinian territory as it was in 1922, disregarding the distinct existence of Israel as a sovereign state since 1948. Regarding the Palestinian population in the envisaged Palestinian state, Article 6 makes it clear that those "Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians." The P.L.O. feel that Palestine was invaded by Jews after the Balfour Declaration of 1917 and would like to see all of those who came into Palestine in the wake of the Declaration being driven out. But if such a step was to be taken, it would be inconsistent with the international law of human rights. Article 1 of the

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[15] Moore, op.cit. 706.

International Convention on the Elimination of All Forms of Racial Discrimination abhors:

> . . . any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.[16]

However, Israel has been accused of violating the same Convention by systematically expelling Palestinian Arabs from the occupied territories of West Bank and Gaza.[17]

Article 9 put emphasis on armed struggle as the only way to liberate Palestine. To that extent, it would be consistent with the current law governing wars of national liberation had it not contradicted Article 21 which completely rules out the possibility of any solution "that is a substitute for a complete liberation of Palestine." This article is flawed by the implied destruction of the state of Israel in order to achieve "complete liberation of Palestine" and the rejection of any alternative solution.

The aim to destroy Israel is against international law of sovereignty and the U.N. Charter. The state territory and its appurtenances (air space and territorial sea) together with the government and population within its frontiers comprise the physical and social manifestations of a state[18] and are inviolable. Also, the U.N. Charter under Article 2(6) empowers the Organization to ensure that non-members comply with the Charter principles so far as may be necessary for the maintenance of international peace and security. As such, the U.N. would not allow destruction of its member state thereby threatening international peace and security. Moreover, the rejection of any alternative solution to the conflict, however rational and viable it may be, may not be in the best interests of world peace. The United Nations Charter emphasizes peaceful settlement of international disputes and reiterates, under Article 1(2) "respect for the principle of equal rights and self-determination of peoples," but only through "the appropriate measures to strengthen universal peace."

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[16] Annex to G.A. Res. 2106A(XX) of 21 December 1965, U.N.Y.B. 440 (1965).

[17] See note 159, Chapter II supra.

Article 19 which rejects the establishment of Israel as null and void no matter what the lapse of time is also contrary to international law of emergence and recognition of states.[19] Israel has for long fulfilled the legal criteria of statehood having been in existence for 40 years now. It has a stable organized community and is in control of territory although lacking settled frontiers which are by themselves alone not a major drawback. It also has an effective government with the capacity to enter into relations with other states. Certainly, an entity with its own executive and other organs, conducting its foreign relations through its own organs and having its own system of courts and legal system provides _prima facie_ evidence of statehood.[20] It is therefore submitted that the P.L.O. program aiming at the termination of Israel and establishment of a "secular state" with a probable Arab majority within the boundaries of "Palestine" has no legal basis.[21] The only relevant legal framework for peace in the Arab-Israeli conflict remains S.C. Resolution 242 of 1967, which calls for Israel's withdrawal from occupied territories and negotiation for peace with all parties in the conflict.[22]

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[18] I. Brownlie, Principles of Public International Law 109 (1979).

[19] H. Lauterpacht, Recognition in International Law 26-30 (1947).

Many U.N. member states which support measures in favour of the P.L.O. do not envisage a solution of total annihilation of Israel in order to end the conflict.[23] Indeed, the current state of conflict will almost certainly not change before the P.L.O. expressly amends its Covenant and renounces the present goal of ending Israel's existence as an independent sovereign state. Until this occurs, all states concerned with protecting the legitimate national rights of Israel will continue to treat the P.L.O. suspiciously. In turn, this will greatly diminish the P.L.O.'s effectiveness as an authoritative representative of the Palestinian people.

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[20] See provisions of Article 1 of the Montevideo Convention on Rights and Duties of States, which has since been largely upheld as containing all the necessary indicias of statehood in international law. The Convention was signed at Montevideo, 26 December 1933. Hudson, _VI International Legislation 620_.

[21] See the statement of P.L.O. Representative to the Security Council, _13 U.N. Monthly Chronicle, No. 2_, 8-9 (1976).

[22] _U.N.Y.B. 257_ (1967).

Reasons behind the P.L.O.'s consistent refusal to change the basic tenets of its Covenant in spite of impeding efforts for a peaceful negotiated settlement of the Arab/Israeli conflict, seem to be lack of unanimity among various factions which make up the P.L.O. They differ in ideologies and lack homogeneity to be able to operate with easy flexibility. This means a shift in policy might result in a split in the P.L.O. and a ferocious internal struggle. The plurality of organizations under P.L.O. moves toward more rigid stands whose common denominator leans toward those of the extreme political groups which makes the majority in the coalition.[24]

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[23] See statements made during the Security Council debate of January 1976, on the proposed Resolution on Palestinian Self-determination, of the representatives of the following states: Guyana, Pakistan, U.S.S.R., Tanzania, Yugoslavia, Romania, East Germany and Bulgaria. 13 U.N. Monthly Chronicle, No. 2 at 11,12,13,14,16 and 64. These statements clearly envisaged the continued existence of Israel in any Middle East settlement and focused upon withdrawal of Israel from the territories captured in 1967 and the establishment of a separate Palestinian Arab state which would exist with Israel.

Another important factor is that P.L.O. factions have different political and ideological leanings toward outside governments which tends to influence their policies within the P.L.O. Fatah, the largest and most important faction, eschews social ideology in order to maintain relations with all Arab states. Saiqa is subservient to the Syrian government; P.F.L.P. is a Marxist organization with policies closest to communist countries; P.D.F.L.P. is closest to Moscow; the Arab Liberation Front leans toward Iraq; and P.F.L.P.-General Command is close to Syria.[25] Certainly, these alignments are likely to strengthen opposition to any change in basic P.L.O. positions. A more practical consideration seems to be that of acceptance to co-exist with Israel which would mean that the P.L.O. consider the West Bank and Gaza as the maximum, final Palestinian share of former Palestine west of the Jordan River. This would conform to the 1967 Security Council Resolution 242[26] but would by no means be satisfactory to all Palestinians living in the occupied territories, Lebanon, Jordan and elsewhere in the Arab world.

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[24] Gruen, *et al.*, *op.cit.* 56.
[25] See generally Miller, note 4 supra.
[26] See note 20 supra.

There is yet another fundamental issue relating to the definition of Arabs. While the Arabs generally define their identity ethnically, culturally and linguistically,[27] Palestinians regard themselves territorially as a people who live or came from Palestine.[28] Therefore, for them to agree to a smaller Palestine might amount to reducing their identity. It is because of different policies and strategies pursued by various P.L.O. factions that militate against any fundamental change in the P.L.O. policy. On the international level, so far as some of those policies as contained in the Covenant conflict with the generally accepted norms, there is a general duty to bring internal law in conformity with obligations under international law.[29] This requirement applies only to states, but so long as P.L.O. policy is geared toward the creation of a state it cannot hold fast its Covenant hoping to evade obligations incumbent upon it under international law. It is therefore imperative that, for the P.L.O. to have an effective Covenant, it must accept changes obligated by the law of nations.

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[27] Gruen et al., op.cit. 58.

[28] See Article 1 of the P.L.O. Covenant, note 11 supra.

[29] The Vienna Convention on the Law of Treaties, Article 27, 8 I.L.M. 679 (1969).

Relationship of the P.L.O. and Arab States

The relationship of the P.L.O. and Arab states is historical in the sense that, prior to the establishment of British rule at the end of World War I, there was no distinctive Palestinian people, nor a distinct political entity. The Palestinian Arabs were part of the Ottoman Empire which administered Palestine as part of the Syrian province. Palestinian consciousness began after the Balfour Declaration of 1917 with the subsequent establishment of the British Mandate and the approval of Jewish immigration to Palestine.[30] Even then the Palestinian Arabs still considered themselves part of a large Arab world and lacked cohesion. Their abortive rebellion against the British between 1936 and 1939[31] was partly because of lack of a cohesive political movement. The Supreme Arab Committee, later known as the Arab Higher Committee which was formed in April of 1936, was not strong enough to forge ahead the demand for a free Palestine exclusive of Jews. It was not until March, 1945, when, as a result of the common Arab fear of the growing zionist threat to Palestine, that the Arab League was created.[32] It contained a special section which allowed Palestinians to participate to some extent in League meetings in the expectation that Palestine would ultimately become independent and a fully fledged member of the League.[33]

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[30] See Section IIa, Chapter II supra.

[31] See Section IIIa, *ibid.*

[32] Pact of the Arab League. Signed at Cairo, 22 March 1945. *Hudson, IX International Legislation 300*.

Since then, the Arab states took up the Palestinian issue and began applying diplomatic pressure on behalf of the Palestine Arabs. On July 25, 1946, the British government invited the Arab governments, the Arab Higher Committee for Palestine and the Jewish Agency to attend a conference in London in order to resolve the Palestine problem. At the meeting, the Arab states supported the Arab Higher Committee to reject the British proposal for partition of Palestine. The meeting ended in deadlock and the British government subsequently requested the United Nations to deal with the problem.[34] When the United Nations recommended partition in November of 1947, the Arab states exerted diplomatic opposition to the partition plan leading to a full-scale war after proclamation of the state of Israel on May 15, 1948. The war ended after the signing of armistice agreements between Israel and Arab states.[35] However, since 1948, the Israel/Palestine conflict has been embraced throughout the Arab world as part of their common problem.

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[33] F. Khouri, The Arab-Israeli Dilemma 31 (1985).
[34] See note 64, Chapter II supra.
[35] See note 104-107, Chapter II supra.

The deep involvement of Arab states in the conflict is largely attributed to pan-Arabism and humanitarian considerations. Pan-Arabism as a political movement dates back to the nineteenth century when the Ottoman Empire began to disintegrate. To most Arab rulers, pan-Arabism became a principle of unity resting largely on the idea of Muslim solidarity.[36] During World War I, when it became clear that the Ottoman Empire would not survive the war and Britain sought to detach Arab portions from the Ottoman Empire, the local Arab rulers cooperated with the hope that after the war they would be left alone. However, in the aftermath of the war, Arab independence was short-lived since Britain and France took over the areas formerly administered as part of the Ottoman Empire. The resentment of Arab rulers resulted in determination to preserve pan-Arabism and Islam throughout the Arab world in spite of British and French presence in their territories. The decision to partition Palestine was therefore viewed not only as encroaching on Arab solidarity and an affront to Islam, but also as an attempt to legalize continuous foreign domination of the Arab world.

As to humanitarian ground, Arab states justify their intervention in the Palestinian conflict in order to protect their kith and kin. Egypt pleaded before the Security Council in 1948 that her forces had entered

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[36] N. Safran, From War to War 60 (1969).

Palestine to protect the Arab inhabitants of that territory because "Egyptians do not regard Palestinian Arabs as strangers since they have been from time immemorial bound by many ties."[37] This justification has been applied in similar situations by, *inter alia*, India and Israel and generally accepted in international law. In 1961, India justified her Goa annexation to end colonialism and protect the kith and kin from Portuguese rule.[38] Similarly, the trial of Adolf Eichmann who was charged in Israel with having committed "a crime against the Jewish people" followed the same kith and kin trend. The defence that there was insufficient nexus between the Jewish people and the state of Israel to warrant such an extraterritorial legislation was rejected by the Israeli court and the defendant was sentenced to death.[39]

The Egyptian plea before the Security Council in 1948 seems to have been representative of all Arab states and is the reason why the whole Arab world has since been actively involved in the Palestine conflict. The Arab support for formation of the P.L.O. in 1964 was therefore in keeping with the traditional bond existing throughout the Arab world.

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[37] Cited by C.J.R. Dugard, "Organization of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence," *16 Int'l & Comp. L.Q. 178* (1967).

[38] *Ibid.*

[39] *56 A.J.I.L. 805* at 828-832 (1962).

The Palestinian refugees living in almost all Arab countries is another reason causing Arab states to be deeply involved in the Arab-Israeli conflict.[40] Arab states have made little effort to resettle the refugees in their territories partly wishing to keep this problem alive by insisting on repatriation to their homeland and/or compensation in order to attract world opinion against Israel.[41] By the same token, most Palestinian refugees would not like to be resettled in other Arab countries because of fear of losing their Palestinian identity. In view of these factors, it becomes more obvious that the relationship of the P.L.O. with Arab states is well rooted in natural historical connections so much so that any solution to the Arab-Israeli conflict must of necessity include other Arab states.

The P.L.O. and the United Nations

In spite of the controversial P.L.O. National Covenant and policies derived therein, the P.L.O. derived a major breakthrough in the international arena when it was granted observer status by the United Nations in 1974.[42] In its Resolution, the General Assembly recognized Palestinian people as entitled to self-determination in accordance with the U.N. Charter and reaffirmed their right to national independence and sovereignty. Two factors which enabled this important development were, first, the growing influence of Arab states especially the then lingering threat of a sudden oil embargo,[43] and second, the principle of self-determination had by 1974 gained major ground as an international legal right[44] and was therefore applicable to the Palestinian people. Nevertheless, recognition of the P.L.O. as representative of the Palestinian people did not in any way extend to endorsement of some of its policies such as liquidation of the state of Israel.[45] Indeed, Resolution 3236 made it clear that "the right of the Palestinian people to gain its rights by all means" should be "in accordance with the purposes and principles of the Charter of the United Nations."[46] This emphasis outlawed application of any means inconsistent with international law.

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[40] See Section VII, Chapter II supra.
[41] Khouri, op.cit. 168.
[42] G.A. Resolution 3236(XXIX) U.N.Y.B. 226 (1974).

The P.L.O. was also invited to participate in all "efforts, deliberations and conferences" on the Middle East held under U.N. auspices.[47] Even before that invitation, it had already participated as an observer in several U.N. specialized agencies, namely, the International Telecommunication Union Plenipotentiary Conference (Malaya and Torremolinos, September-October 1973),[48] the 27th World Health Assembly (Geneva, May 1974),[49] and the 17th Congress of the Universal Postal Union (U.P.U.) (Lausanne, May-July 1974).[50] The P.L.O. also participated in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-1977) under the auspices of the International Committee of the Red Cross (I.C.R.C.) and signed the Final Act.[51]

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[43] J. Stone, "Palestinian Resolution: Zenith or Nadir of the General Assembly," 8 Journal of Int'l L. & Politics 2 (1975-76).

[44] See Section I(c), Chapter I.

[45] See note 19 supra.

[46] See para. 5, note 42 supra.

[47] G.A. Resolution 3375(XXX), November 10, 1975.

The P.L.O. was also invited to participate as an observer at the Third Law of the Sea Conference (1974-1982),[52] the 3rd World Population Conference (Bucharest,

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[48] Resolution No. 29 of the International Telecommunication Union, International Telecommunications Convention, Final Protocol, Additional Protocols, Resolutions and Opinion, I.T.U. Doc. M 13.902 - 1974 at 288 (1974).

[49] W.H.O. Resolution, W.H.A. 27.37, 27th World Health Assembly, A/27/VR/13 (1974).

[50] Resolution Nos. C3 and C4, Universal Postal Union, Congress de Lausanne 1974, Decisions autre que celle Modifiant les Actes (Resolutions, Voeux, etc.) at 9 (1974).

[51] International Committee of the Red Cross, Report of the Work of the Conference of Government Experts on the Use of Certain Conventional Weapons (Preliminary English Text) at 1 (1974).

[52] Third United Nations Conference on the Law of the Sea, Rules of Procedure, U.N. Doc. A/CONF. - 62/30/Rev. 1 at 15 (1974).

August 1974),[53] the International Civil Aviation Organization (I.C.A.O.) annual meeting (Montreal, September-October 1974),[54] the I.C.R.C.'s Conference of Government Experts on Weapons that may cause unnecessary suffering or have indiscriminate effects (Lucerne, September-October 1974),[55] the UNESCO Conference (Geneva, October-November 1974)[56] and the World Food Conference (Rome, November 1974).[57]

At present, the P.L.O. participates in virtually all international conferences as an observer. Observer status does not, however, amount to endorsement of P.L.O. policies. It was explained long ago by the U.N. Security Council that "observer status in the [General Assembly] simply means the right to attend without participation in debate or in voting and, on invitation, to participate in debate."[58] When the U.N. General Assembly invited the

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[53] 56 U.N. ECOSOC Resolution 1835 Supp. 1, U.N. Doc E/5544 at 1 (1974).

[54] Report of the Executive Committee to the Plenary on Agenda Item 17 (Resolution of the U.N. concerning invitations to liberation movements to attend meetings of specialized agencies), I.C.A.O. Doc. A21-WP/145 (1974).

[55] I.C.R.C., note 51 supra, Annex 1 at 22.

[56] Resolutions and Decisions adopted by the UNESCO Executive Board at its 95th Session, UNESCO Doc. 95 Executive Board Decisions 25-26 (1974); 11 U.N. Monthly Chronicle 156 (1974).

[57] U.N. ECOSOC, Resolution 1840, Supp. 1, U.N. Doc. E/5544 at 4 (1974).

[58] Report of the Secretary General on "Question of Invitations to Certain Regional Organizations Invited to Attend Previous Session of the Council (ECOSOC)," U.N. Doc. E/2028, June 20, 1951, at 3.

P.L.O. to participate in the sessions of the General Assembly, it did so, indeed, by recognizing the P.L.O.'s representative capacity to the Palestinian people and without necessarily discussing P.L.O. policies.[59]

Since then, the P.L.O. has made major diplomatic breakthroughs including recognition by more than 100 states and has offices similar to diplomatic missions in many states.[60] Although this recognition is different from that accorded to new sovereign states or governments because the P.L.O. does not possess any of those qualities at the moment, it nevertheless bears some legal consequences since recognition generally is a political act and is not governed by strict rules of international law. The mode and extent of recognition is solely a sovereign free act of a state and is done according to the practical exigencies of the situation.

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[59] For example, in the ongoing legal wrangle between the United States and the P.L.O. regarding an attempt by the former to expel the P.L.O. from the U.N., branding it as a terrorist organization, the U.N. has rejected the U.S. expulsion order for the P.L.O. to leave the United Nations Headquarters. See Section III, Chapter V infra.

[60] Mr. Yasser Arafat, Chairman of the P.L.O., claimed that 103 states had recognized the P.L.O. at a press conference held in Abu Dhabi in 1974. Al Ittihad (Israel), March 22, 1974 at 3, col. 5-6, cited by A.F. Kassim, "The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law," 9 Denver Journal of Int'l Law & Policy 19 (1980).

Juridical Appraisal of the P.L.O.

The Palestine Liberation Organization has restricted legal personality on the international plane by virtue of being a national liberation movement representing the Palestinian people in the struggle for self-determination.[61] Whilst the P.L.O. cannot claim privileges and immunities like those of a sovereign state as of right, it is capable of being a suitable candidate for the conferment of like privileges and immunities by considerations of special types of personality of non-self governing peoples within the meaning of Chapter XI of the United Nations Charter.[62] Indeed, as international law keeps changing and accommodating new realities, it has been suggested that it must accept "legitimate human desires"[63] and:

> In each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to experience and to the reason of the law as distinguished from a pre-conceived notion as to who can be subjects of international law.[64]

Therefore, those states which voted for the P.L.O.'s participation in the U.N. General Assembly's plenary sessions were expressing the legitimate right of the Palestinian people to self-determination and acknowledging the special status of non-self.governing peoples on the international plane as subjects of international law. While the idea of Palestinian self-determination enjoys a wide range of international support, it is, however, linked to the P.L.O.'s acceptance of Israel's "right of existence and to security."[65]

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[61] See Section 1(c), Chapter I.

[62] Brownlie, op.cit. 66.

[63] P. Gajendragadkar, Law, Liberty and Social Justice 45 (1965); Brownlie, ibid. at 61.

[64] See e.g. H. Lauterpacht, International Law and Human Rights 27, 38, 54 (1968).

Section II: The Six Day War of 1967

General Background

In 1967, the Middle East faced the third war since the establishment of the state of Israel. The same reasons that brought about the 1956 "Sinai War" between Israel and Egypt were also responsible for the 1967 onslaught.[66] Curtailed freedom of shipping for Israeli vessels in the Gulf of Aqaba, increased Palestinian fedayeen attacks on Israel and the alleged continuous state of belligerence with the threat of attack on Israel by the joint Egypt-Syria-Jordan military command made the Arab-Israeli war possible.

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[65] See e.g. the European Venice Declaration, 13 June 1981. Yehuda Lukacs, Documents on the Israeli-Palestinian Conflict, 1967-1983, 13 (1984).

[66] See Section VI, Chapter II.

The latter part of 1966 experienced a series of clashes at the Syrian-Israeli border carried out by Palestinian fedayeen moving through Jordan and Lebanon but for the most part from Syria.[67] In October of that year, two serious incidents in which several Israelis were killed prompted Israeli troops to retaliate by moving forces to Jordan and destroying the town of Samu.[68] A series of military pacts were signed between Arab states in preparation for joint attack to Israel. Earlier in that same year, a coup d'état in Syria had brought into power a military government sympathetic to the P.L.O. and was determined to see the Palestine Liberation Army carry through raids inside Israel. At a press conference which was taken to signal impending military engagement with Israel, the Syrian Prime Minister declared in October:

> We are not sentinels over Israel's security and are not the leash that restrains the revolution of the displaced and persecuted Palestinian people.[69]

The following month, Syria signed an agreement for a joint military command with Egypt involving measures of coordination and integration between the two countries.[70]

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[67] C.W. Yost, "The Arab-Israeli War: How it Began," Moore (ed.), The Arab-Israeli Conflict 5 (1974); See also R.H. Forward et al., "The Arab-Israeli War and International Law," 9 Harvard International Law Journal 242 (1968).

[68] Forward, ibid.

[69] Cited by Yost, op.cit. 6.

[70] Forward, loc.cit.

There followed numerous military raids from Syria against Israel and the latter threatened massive retaliation. As a result of fear that Israel was about to launch a major military attack against Syria, Egypt requested the U.N. Secretary General to withdraw the U.N. Emergency Force (U.N.E.F.) from its territory. In view of its assessment of the situation, Egypt intended to move its armed forces up to the Sinai Armistice line in order either to deter Israel or to come to Syria's assistance should deterrence fail.

The Secretary General had difficulty in deciding whether withdrawal of troops from the Egyptian side of the armistice lines was in keeping with the original purpose of peace keeping there. The U.N.E.F. was sent to Egypt in 1957 following the cease-fire agreement concluded between Egypt and Israel under the auspices of the United Nations.[71] After intensive discussion with Egyptian authorities, the Secretary General eventually gave consent to withdraw U.N.E.F. troops although under no circumstances was the withdrawal of U.N.E.F. a primary cause for the June war. U.N.E.F. was deployed on the Egyptian border upon her consent and had the right to demand withdrawal just as Israel withheld consent to station U.N.E.F. troops on her side of the armistice line. The report of the U.N. Secretary General on the U.N.E.F. withdrawal made it clear that it was very important to obtain Egypt's consent for the continued deployment of U.N.E.F. troops on its soil. The report said:

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[71] R. Higgins, U.N. Peacekeeping 1946-67, 227 (1969).

> The Government of Egypt, understandably, did not wish to give permission for the arrival on its soil of an international force, unless it was assured that its sovereignty would be respected and a request for withdrawal of the force would be honoured by the Secretary General. There is no record to indicate that this assumption was ever questioned.[72]

Consent to withdrawal of U.N.E.F. troops from the Secretary General came after serious consideration of various factors. First, the indicated redeployment of Egyptian and Syrian forces was incompatible with the continuance of U.N.E.F. since it deprived U.N.E.F. of its essential function as a buffer between Egyptian and Israeli forces. The redeployment of Egyptian forces apparently in aid of Syria was implied in President Nasser's address to the Egyptian Air Force on May 22 in which he said:

> On May 12, a very impertinent statement was made . . . . The statement said that the Israeli commanders have announced that they would carry out military operations against Syria in order to occupy Damascus and overthrow the Syrian Government. On the same day, Israeli Premier Eshkol made a strongly threatening statement against Syria . . . . We are capable of bearing our duties in Yemen . . . and in attacking if Israel attacks Arab country . . . . The decision made by Israel at this time was to carry out an aggression against Syria as of May 17 . . . . On May 16 we requested the withdrawal of the U.N.E.F.[73]

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[72] Report of the Secretary General on the Withdrawal of the United Nations Emergency Force (U.N.E.F.), 4 U.N. Monthly Chronicle 135 (1967).

[73] New York Times, May 16, 1967, cited by A. Lall, The U.N. and the Middle East Crisis 7-8 (1967).

Secondly, U.N.E.F. had hitherto been able to function effectively only because of an informal Egyptian agreement that its forces would be held 2,000 metres back from the armistice line in Sinai (Israeli forces patrolled right up to the line).[74] Thirdly, once the confrontation between the two forces was re-established it was very probable that U.N.E.F. units scattered among them would be unable to prevent it.[75] Fourthly, India and Yugoslavia, two of the troop-contributing states had made clear their intention to withdraw their contingents whatever the Secretary General decided and others were likely to follow suit.[76] Fifthly, the Egyptian Government had the legal right both to move its troops where it wished in its territory and to insist on the withdrawal of U.N.E.F. at any time. Sixthly, if the United Nations contested that right, which it did, peacekeeping would become "occupation," a step amounting to tampering with Egyptian sovereignty.

In spite of the above factors which the Secretary General took into account in consenting to withdraw the forces, it is doubtful whether the power of consent rested with him. The U.N.E.F. derived its mandate from the resolution of the U.N. General Assembly and it would seem proper that the same body had power either to grant or refuse consent to withdraw the forces.[77] However, it has been suggested, though not in any way absolving the Secretary General of legal responsibility, that referring Egyptian requests to the Security Council or the General Assembly would merely have produced prolonged debate, as subsequent events proved, during which U.N.E.F. would have disintegrated or been helplessly involved in war.[78] The withdrawal of U.N.E.F. on the brink of war appears ironical and a mockery of the U.N. peace-keeping process under the Charter. Chapter VII empowers the Security Council to take any measures necessary for the preservation of peace and security. Under such powers it would have been possible for the Security Council to deploy a military force between Israel and Egypt regardless of objections from either side, but such a step looked elusive because of the rivalry between the U.S. and Soviet Union since any decision to that effect would require unanimity of the Security Council including the concurring votes of the permanent members.[79]

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[74] Yost, op.cit. 15.

[75] The strength of U.N.E.F. as at 15 November 1965 was 4,579 all ranks comprising contingents supplied by seven countries. Higgins, op.cit. 314.

[76] Yost, loc.cit.

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[77] G.A. Res. 1001 (ES-1) of November 7, 1956.

[78] Yost, , *loc.cit.* Theoretically since the Security Council is charged with the responsibility of keeping peace it would be ridiculous for it to stand by and see the U.N.E.F. annihilated in the Arab-Israeli confrontation. In practical sense this might have happened since the history of the Arab-Israeli conflict has proved the Security Council's lack of unanimity on decisions relating to the conflict.

[79] U.N. Charter Article 27(3).

The process for U.N.E.F. withdrawal began on May 18 and was completed by June 17. On May 22, Egypt took over the U.N.E.F. posts at Sharm el Sheikh and President Nasser announced plans to reimpose blockades against Israeli shipping in the Gulf of Aqaba. He declared:

> What is ~~the~~ meaning of the armed forces occupation of Sharm el Sheikh? It is an affirmation of our rights and our sovereignty over the Aqaba Gulf . . . . The Aqaba Gulf constitutes Egyptian territorial waters. Under no circumstances will we allow the Israeli flag to pass through the Aqaba Gulf.[80]

This declaration was by no means correct because it ignored the true position of the international law of the sea.[81] In reply the next day, Israeli Prime Minister Eshkol declared in Parliament:

> The *Knesset* (Parliament) knows that any interference with freedom of shipping in the Gulf and in the Straits constitutes a flagrant violation of international law . . . . It constitutes an act of aggression against Israel.[82]

Mobilization of forces on all sides began thereafter and on June 5, hostilities erupted between Israel, Jordan, Syria and the United Arab Republic (Egypt) with Israel making the first air strikes against Arab states. The war lasted for six days with Arab armies suffering a devastating defeat by Israel.

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[80] New York Times, May 26, 1967, at 16 col. 5.
[81] Article 16(4), *516 U.N.T.S. 206*.
[82] New York Times, May 27, 1967.

For a better analysis of controversies arising from this war, an examination of issues which brought about the war and those resulting therefrom will be considered. When Egypt announced a blockade of the Gulf of Aqaba thereby preventing Israel from gaining access to her port of Elath, Israel claimed that Egypt had committed an act of war by preventing her enjoyment of the right of access to an international waterway. Egypt, in her defense, claimed the right to blockade on the basis of an alleged state of belligerency existing between them since 1948 and on this ground regarded herself as possessing the right to blockade Israel from her territorial waters.[83] Israel rejected the existence of the state of belligerency and argued that a state of peace had existed since 1949.

Legal Issues

State of Belligerency and Armistice Agreements

Since the signing of the Armistice Agreements between Israel and the Arab states,[84] the latter consistently maintained that the agreements were in a nature of a temporary military ceasefire pending settlement of the state of belligerency in a formal peace treaty. However, Israel, with the support of the Security Council, claimed that the armistice agreements were the equivalent of a peace treaty and that they terminated any claim to belligerency.[85]

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[83] On President Nasser's speech, see note 80 supra.
[84] See notes 104-107, Chapter II.

The status of an armistice in modern international law has tended to become the equivalent of a peace treaty under the traditional approach.[86] This tendency, developed in recent years, has caused armistices to replace peace treaties as a practical matter. In the case of Arab-Israeli armistice agreements, they contained an institutional means for dispute settlement.[87] Violation of any term of the truce gave rise only to action by the Security Council. It did not give parties any right to resort to force and, therefore, claims of belligerency by Arab states had no legal basis.

Status of the Suez Canal and the Gulf of Aqaba

The Six Day War once again raised the issue concerning the legal status of the Suez Canal and the Gulf of Aqaba regarding the international right of free passage.[88] The Suez Canal was not closed before the war, but since it was under Egyptian control it was blockaded when the war broke out. Egypt repeatedly claimed the exclusive right of control of both the Suez Canal and the entrance to the Gulf of Aqaba which, according to Egypt, formed part of Egyptian sovereignty. International law, however, does not support the Egyptian claim but, on the contrary, Israel had the right to demand innocent passage in both the Suez Canal and the Gulf of Aqaba.[89]

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[85] See Security Council Resolution S/-2322 (1951), U.N.Y.B. 299 (1951).

[86] The traditional approach to an armistice as a temporary cessation of hostilities is treated by Lauterpacht in L. Oppenheim, 2 International Law ss. 231-237 (1952).

[87] For example, the Israeli-Syrian Armistice Agreement provides for convening a conference in case of disputes (Article 8(3)) and for referring the dispute to the Security Council (Article 8(4)). See note 84 supra.

The Suez Canal. The Canal was opened in 1869 at the time when Egyptian territory was part of the Ottoman Empire.[90] In 1854, 1856, and 1866, the Kheldive (Governor) of Egypt issued concessions to the Sultan of the Ottoman Empire granting him the right to connect the Mediterranean and the Red Sea by a canal. The articles of concession stressed Egypt's right to supervise the Canal, to enforce law and public order, and to occupy any point on the borders of the Canal whenever this was deemed necessary for the defence of the country, as a manifestation of sovereignty over the Canal territory.[91]

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[88] The legal status of the Suez Canal and the Gulf of Agaba was first raised during the 1956 "Sinai War." See C.B. Selak, "A Consideration of the Gulf of Agaba," 52 A.J.I.L. 660 (1958).

[89] Article 16(4), note 81 supra.

[90] J. Hurewitz, 1 Diplomacy in the Near and Middle East 146-49 (1956).

[91] M. Khadduri, "Closure of the Suez Canal to Israeli Shipping," 33 Law and Contemporary Problems 148 (1968).

The international character of the Canal appeared in the Preamble to the Constantinople Convention of October 29, 1888,[92] which stated that the intention of signatory powers was to establish:

> . . . a definitive system intended to guarantee, at all times and to all the Powers, the free use of the Suez Maritime Canal and thus to complete the system under which the navigation of this Canal had been placed by the Firman of His Imperial Majesty the Sultan, dated February 22, 1866 . . . .[93]

The legal obligation specifying free navigation to all nations including freedom of passage in time of war and peace is under Article 1 which reads that:

> The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

The Article made a binding commitment on the Sultan of Ottoman to leave the Suez Canal free from any interference. The Canal's neutrality even in the event of the Ottoman Empire becoming one of the belligerent Powers is stated in Article 4:

> The Maritime Canal remaining open in time of war as a free passage . . ., no right of war, act of hostility or act having for its purpose to interfere with the free navigation of the Canal, shall be committed in the Canal and its parts

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[92] Moore, 3 Digest of International Law 264-66.

[93] They were Great Britain, Austria-Hungary, France, Germany, Italy, the Netherlands, Russia, Spain and Turkey.

> . . . even though the Ottoman Empire should be one of the belligerent Powers.

These legal safeguards unequivocally state the international navigational character of the Suez Canal although sovereignty over the area rested with Egypt. After independence, in 1922, Egypt never repudiated this treaty and is therefore still bound by it by virtue of Article 12 of the Vienna Convention on Succession of States in Respect of Treaties.[94] It provides that:

> 1. A succession of states does not as such affect:
> (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign state and considered as attaching to the territories in question.
> (b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign state and considered as attaching to the territories in question.

Israel's claim to the right of innocent passage through the Suez Canal is therefore based on the Constantinople Convention of 1888 in which she was impliedly included under the general term "without distinction of flag." By the terms of Articles 1 and 4 of the Convention, Israel claimed that Egypt's restrictive measures constituted an act of war in the Canal waters on the ground that Egypt possessed no right to take offensive measures in the Canal zone.[95] Egypt's claim to a belligerent status as justifying closure of the Suez Canal was already rejected by the Security Council which called upon her to "terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound."[96] On October 13, 1956, the Security Council had affirmed this position when it declared that "there should be free and open transit through the Canal without discrimination overt or covert" and that "the operation of the Canal should be insulated from the politics of any country."[97]

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[94] 17 I.L.M. 1488 (1978); See also O'Connell, "Independence and Problems of State Succession," in O'Brien, The New Nations in International Law and Diplomacy, passim (1965).

If the doctrine of precedent is something to go by to uphold the rule of law, the S.S. "Wimbledon" Case[98] justified Israel's right to enjoy innocent passage through the Canal and such a right derived from the aggregate right granted to other nations by the Constantinople Convention. In the S.S. "Wimbledon", the Permanent Court of International Justice held Germany liable for violation of the contractual obligations into which she had entered at Versailles when she signed the Peace Treaty[99] with the Allied and Associated Powers, providing under Article 380 that:

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[95] B. Avram, The Creation of the Suez Canal Status from 1869 up to 1956, 119-121 (1958).

[96] See note 85 supra.

[97] S.C. Res. 118 (1956), the second part of the proposed Resolution which was vetoed by the Soviet Union had called on Egypt to agree to a system which met the guarantees of the users of the Suez Canal. M. Whiteman, 3 Digest of International Law, 1109 (1964).

[98] P.C.I.J. Series A, Part 1 at 11.

> The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

In March, 1921, the steamship "Wimbledon" chartered by the French Company was refused passage through the Kiel Canal on the ground that the vessel had on board a cargo of munitions and artillery stores consigned to the Polish Military Mission at Danzig. Germany had by then declined neutrality in the on-going Russo-Polish war and maintained that neutrality prohibited the transit of ammunition destined for Poland or Russia. It was found by the court that, although the Canal was constructed by Germany in German territory, it was, until the 1919 Peace Treaty, an internal German waterway. However, the court went on to find that the Canal had ceased to be an internal and national navigable water, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it had become an international waterway intended to provide easier access to the areas beyond the Canal for the benefit of all nations of the world. Accordingly, it was held that, in war time as in peace time, the Kiel Canal should have been open to the "Wimbledon" just as to every vessel of every nation at peace with Germany.

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[99] C. Parry, 225 The Consolidated Treaty Series 188 (1919).

The Gulf of Aqaba and the Strait of Tiran. The legal position regarding the Gulf and the Strait is similar to that of the Suez Canal. International straits under customary international law and the United Nations Convention on the Territorial Sea and Contiguous Zone, 1958,[100] are open to "innocent passage" by vessels of all states. The Strait of Tiran is an opening to Egypt, Jordan, Saudi Arabia and Israel all of which have ports on the Gulf of Aqaba. This makes the Gulf of Aqaba an international sea. The generally accepted principle with respect to the Gulfs and Bays surrounded by territories of more than one state is that:

> . . . all gulfs and bays enclosed by the land of more than one littoral state, however narrow their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt (territorial sea) inside the gulfs and bays excepted. They can never be appropriated; they are in time of peace and war open to vessels of all nations, including men-of-war, and foreign fishing vessels cannot, therefore, be compelled to comply with municipal regulations of the littoral state concerning the mode of fishing.[101]

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[100] Article 16(4), note 89 supra. See also Corfu Channel Case, [1949] I.C.J. Reports 4 at 28-30.

[101] L. Oppenheim, 1 International Law: Peace (ed. Lauterpacht) 460-461 (1948).

Egypt was not a party to the 1958 Convention; but even if it was a party and acted to exclude Israel shipping, probably under Article 14(4) which defines innocent passage as "not prejudicial to peace, good order or security of the coastal state," this ban would still not have included Israeli commercial shipping through the Canal. The validity of the blockade under that provision would have depended on the existence of the state of belligerency, itself being appeased by the 1948 Armistice Agreement. In the absence of such a situation as it were, Egypt's closure of the Strait and Gulf against Israeli shipping was illegal.[102]

Aggressive War

In 1974, the U.N. General Assembly adopted Resolution 3314(XXIX)[103] in which, for the first time, the definition of aggression was unanimously endorsed.

Article 1 of the Annex to the Resolution defines aggression as:

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[102] See also the United States protest to Egyptian detention of the U.S. vessel the S.S. Flying Trader in 1948 on the ground that Egypt would not permit cargo passing through Egyptian ports destined for or which might later be transhipped to Israel, Whiteman, op.cit. 1088. See also the later charge by Israel in 1954 when the S.S. Bat Galim flying the Israel flag had been seized, confiscated and later incorporated into the Egyptian navy. Whiteman, ibid. 1092-93.

[103] U.N.Y.B. 847 (1974).

> . . . the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.

The following Article 2 provides that:

> The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may,in accordance with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are of not sufficient gravity.

This definition did not break any major new ground since it is in keeping with the provisions of the United Nations Charter which requires member states to "refrain from threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations"; but at the same time, reserving to member states the inherent right of individual or collective self-defence if an armed attack occurs to them.[104] The Charter also requires the Security Council to determine the "existence of any threat to the peace, breach of the peace, or act of aggression and make recommendations or decide what measures to take under Article 41 and 42 to maintain or restore international peace and security.[105]

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[104] Article 2(4) and 51 of the Charter.
[105] Article 39 of the Charter.

At least three practical difficulties have emerged over the years which have made the international security system under the U.N. umbrella virtually ineffective. The first difficulty relates to the rivalry of the "Super Powers" which impedes effective application of Chapter VII of the Charter. The "Super Power" cooperation and collective security on which the U.N. system is built has been rendered inoperative by ideological competition and arms race resulting in intense mutual suspicion.[106] Secondly, right from the U.N. inception most states have never been true to their obligations under international law to renounce war. While this has largely been due to the United Nations' inability to take action, it is also true that "every nation is free at all times and regardless of treaty provisions to defend its territories from attack or invasion and it alone is competent to decide whether circumstances require recourse to self-defence . . . ,"[107] and most states believe that their security depends on their capacity to defend themselves by their own arms,[108] or on collective self-defence commitments in regional or other alliances.[109] Thirdly, there is also the problem of indirect aggression in the form of fomenting, organizing, supporting and directing an indigenous insurgency or systematic terrorism, subversion, war-mongering propaganda and guerrilla warfare against a neighbouring state.[110]

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[106] W.V. O'Brien, "International Law and the Outbreak of War in the Middle East, 1967," in Moore, ibid., Vol. 2 at 97.

[107] Secretary of State Kellogg, quoted in Green, "Armed Conflict, War and Self-Defence," 6 Archiv des Völkerrechts 387 at 432-433 (1957).

[108] Article 51 of the Charter.

[109] Article 53 of the Charter.

The above three factors all influenced the war between Israel and Arab states in 1967 and the United Nations did not determine the aggressor in the conflict since such determination would probably be difficult. Israel claimed that Egypt's action of closing the Strait of Tiran and the Gulf of Aqaba was a blockade which constituted an act of war against Israel.[111]

The expulsion of U.N.E.F. by Egypt and mobilization of its forces in the Sinai and the Gaza Strip on the Israeli frontier was taken as a further indication of aggressive intentions. Israel thus claimed that she was a victim of "armed attack" in the broad sense and was free to act defensively under Article 51 of the Charter, in spite of her earlier refusal to permit U.N.E.F. troops to cross the armistice line to its territory. Egypt, in turn, considered the closure of the Strait of Tiran and the Gulf of Aqaba to be within its domestic jurisdiction. It also claimed that mobilization of her forces was necessary for defence against Israeli mobilization on the Syrian frontier, that it had no intention of initiating hostilities, and that it did not in fact take military action until Israeli air forces had bombed Egyptian airports which was followed by simultaneous Israeli action in the Gaza Strip, Sinai, Sharm al-Sheikh and other areas.[112]

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[110] See H. Lauterpacht, "Revolutionary Activities by Private Persons Against Foreign States," 22 A.J.I.L. 105 (1928); J.B. Whitton, "Radio Propaganda - A Modest Proposal," 52 A.J.I.L. 739 (1958).

[111] U.N. Doc. A/PV 1536 at 42-46 (June 19, 1967). An official Egyptian report published on February 19, 1968 stated that President Nasser warned his close advisors in May 1967 that blockade of the Gulf of Aqaba meant certain war with Israel. New York Times, March 3, 1968 at 12 col. 1.

Evidence of Egyptian actions, especially her continuous insistence that a "state of war" existed and her policy to terminate Israel's existence, could well be regarded as very provocative to Israel. Israel, on her part, would have been required to inform the Security Council of these seemingly illegal developments; but, as has already been rightly argued:

> Given the composition of the Council and the Soviet veto power, Moscow's rule in arming the Arab forces, the ambivalent attitude of France, and the past record of the Council . . . Israel could expect no help from the Council.[113]

It is very difficult to know, however, whether the Arab states really intended to attack Israel and wipe it out completely.[114] It was the uncertainty of the facts and the inability of the Security Council to deal with the tense situation that caused Israel to resort to the traditional international law of "anticipatory" self-defence when an enemy attack seemed imminent.[115] Although Israel's action may not have been justifiable under the law of the U.N. Charter, it has long been established that:

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[112] Yost, op.cit. 19.

[113] O'Brien, op.cit. 101.

[114] The Israelis allege that a "fifth phase" was about to unfold in June of 1967 which would involve ground attacks and air strikes on Israeli air fields and cities. Israel has charged that Egyptian aircraft were engaged in intensive air reconnaissance preparatory to these attacks and that Israel's territorial air space was violated by some of these flights. Israel also claims to have captured

> It is not every "armed attack" which can automatically be characterized as illegal. . . . A State may, in the exercise of the right of self-defence, take "anticipatory" action against an imminent threat to its security which leaves no other course of action open to the state apart from completely jeopardizing its existence. Situations such as that occurring when a state is faced with large-scale mobilization by an avowedly belligerent neighbour on its frontiers . . . are examples of the kind of situations which would appear to justify anticipatory action involving armed force and, possibly, a transgression of the territory of the threatening state.[116]

This interpretation of "armed attack" supports the Israeli position which indeed was right in the circumstances in spite of the requirement, although by no means definitively clear, that only proportional force be applied to the imminent danger. However, in terms of proportionality, Israel's commencement of massive attack on

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operations orders relative to these air and land attacks. Israel Information Service, The Record of Aggression 19-40 (New York, July 1967); Yost, op.cit. 304-311.

[115] Waldock, "Use of Force in International Law," 81 Recueil des Cours 455 at 503 (1952).

[116] Bowett, "Collective Self-Defence Under the Charter of the United Nations," quoted in Green, note 107 supra at 433.

Egypt and especially after her refusal to stationing U.N.E.F. troops on her armistice line was probably not justified by the Egyptian blockade and concomitant threats.[117] On the other hand, it has been proposed that a defending nation, as Israel was, is entitled to assess the situation as a whole[118] and, since all Arab states neighbouring Israel claimed belligerent rights against her in spite of the armistices which were still valid, the blockade of the Strait and the Gulf was enough to signal danger to Israel security and even making it hard for her to proportionally weigh the amount of force required for response.[119] Thus it has been argued that:

> Perhaps only in the case of Israel's invasion of the Arab states does it seem at all convincing, on the facts, that the use of force was truly pre-emptive in a strict sense, i.e. undertaken in reasonable anticipation of an imminent large scale armed attack of which there was substantial evidence. The territorial smallness of Israel, moreover, may make more plausible that country's case for striking first, lest a first blow even with conventional weapons by the other side be as decisive as a nuclear blow would be against a large nation.[120]

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[117] S. Schwebel, "The Middle East: Prospects for Peace," in Moore, note 106 supra at 137.

[118] McDougal & Feliciano, "Legal Regulation of Resort to International Coercion: Aggressive and Self-Defence in Policy Perspective," 68 Yale Law Journal 1057 (1959).

[119] The United Nations Definition of Aggression regards the "blockade of the ports or coasts of a State by the armed forces of another state as an act of aggression." Article 3(c) of Annex to Resolution 3314(XXIX), note 103 supra.

[120] Franck, "Who Killed Article 2:4?," 64 A.J.I.L. 804 (1970).

Since Israel was not labelled as an aggressor by the United Nations,[121] it follows that she might have acted in lawful self-defence as a matter of necessity.

Position of Territories Occupied during the War[122]

Prior to the U.N. Charter, customary international law recognized, with varying degrees of hesitancy, acquisition of territories by conquest and subsequent annexation. Even in the absence of a peace treaty, the status quo post bellum was upheld, since the losing party, by virtue of his having stopped fighting, gave up his claim to the lost territory.[123] This position was restricted to territories gained by war commenced by a nation in violation of international obligations; if the war was legal, as in the case of self-defence, so was the retention of the territory.[124] However, in the case of the Italo-Ethiopian War in which Ethiopia was conquered and annexed by Italy in 1936, many states gave de jure or de facto recognition to Italian control, but Ethiopia remained formally a member of the League of Nations. The fact that Ethiopia maintained her membership in the League of Nations is an evidence that Italy's attack and subsequent annexation was in violation of her international obligations.[125]

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[121] See Security Council debates, 4 U.N. Monthly Chronicle 4-5 (1967).

[122] For a more detailed discussion on the status of occupied territories, see Section 1, Chapter IV infra.

[123] Oppenheim, op.cit. 598-9.

[124] Ibid. 432.

The present position of non-acquisition of territory by war first appeared in the well known Stimson Doctrine in which the U.S. Secretary of State Stimson asserted the doctrine by refusing to recognize *any* change of rights from the Japanese occupation of Manchuria in 1931 in violation of its obligations under the Kellog-Briand Pact. In a diplomatic note sent to China and Japan on January 7, 1932, the Secretary of State stated that:

> In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and that it does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.[126]

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[125] Brownlie, *op.cit.* 86.

[126] Q. Wright, "The Stimson Note of January 7, 1932," *26 A.J.I.L. 342* (1932).

This note was later accepted by the League of Nations which found that the occupation also violated Japanese obligation under Article 10 of the Covenant.[127]

The essence of the Stimson Doctrine is that a state should not attain new rights under international law as a result of a breach of that law: _ex injuria jus non oritur_,[128] implying that there is duty to withdraw forces from an illegally occupied territory. The Doctrine has since been recited by the American states on various occasions and undoubtedly reflects the true legal position on the issue, notwithstanding the regional nature of American states. In their Buenos Aires Declaration of 1936, these states made it an acceptable principle the "proscription of territorial conquest and that, in consequence, no acquisition made through violence shall be recognized."[129] The 1938 Lima Declaration reiterated the same principle, that:

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[127] Article 10 of the League of Nations Covenant provided that "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled." Hudson, _1 International Legislation_ at 1.

[128] Y. Dinstein, "'Para-War' and Peace in the Middle East," in Moore, note 106 at 173.

[129] Whiteman, _Digest of International Law 880-81_ (1965).

> The occupation or acquisition of territory or any other modification or territorial or boundary arrangement obtained through conquest by force or by non-pacific means shall not be valid or have legal effect.[130]

Equally, the Organization of American States (O.A.S.) Charter provides that "no territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."[131]

The Charter of the United Nations goes further. Article 51 recognizes the inherent right of individual or collective self-defence, in the event of an armed attack, only "until the Security Council has taken measures necessary to maintain international peace and security." By this Article, occupation of a foreign territory even if justified by self-defence is outlawed mutatis mutandis when peace and security have been restored by the Security Council.

In the war of June, 1967, Israel, acting in self-defence, occupied Arab territories. In light of Article 51 of the Charter, she was supposed to withdraw from these territories after the Security Council passed Resolution 242 demanding "withdrawal of Israel from territories occupied in the recent conflict."[132]. The Security Council Resolution had urged:

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[130] Ibid. 881.
[131] Article 17, 119 U.N.T.S. 3 (1948).
[132] See note 22 supra.

> . . . termination of all claims or states of belligerency and respect for and acknowledge of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

However, since the Arab states had not yet renounced policies that caused the war, the Resolution did not purport to establish peace in the region. Therefore, as a peace guarantee for Israel, she was entitled to stay in the occupied areas under the principle uti possidetis[133] until peace is concluded. Israel's stay is like what Jordan and Egypt did in the 1948 war by occupying the West Bank and the Gaza respectively (originally proposed to be part of Arab Palestine under the U.N. Partition Plan), until the outbreak of the 1967 war. Egypt and Jordan themselves as military occupants are not entitled to reversionary rights as would ordinarily go to a sovereign who had been temporarily ousted.[134]

However, in as much as Israel was entitled to security and hence her continued occupation of Arab territories, this by no means warranted annexation of the same. Israel proceeded to annex the City of Jerusalem immediately after it was captured during the war.[135] This action was contrary to the 1947 United Nations Plan of Partition which had proposed that Jerusalem be placed under an international regime administered by the United Nations.[136] Jordan, which had formerly administered the City since 1948, opposed Israel's annexation and the U.N. General Assembly adopted two Resolutions on July 4 and 14, 1967, declaring Israel's action "invalid" and calling upon her to "rescind all measures already taken and desist forthwith from taking any action which would alter the status of Jerusalem."[137] When Jordan attempted a similar measure over West Bank in 1950,[138] it was rejected by the Arab League and the international community at large.[139]

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[133] Oppenheim, op.cit. 599.

[134] Y. Blum, "Status of 'Judea and Samaria,'" in Moore, note 106 at 296-98; Stone, in Moore, ibid. at 155.

[135] S.S. Jones, "Status of Jerusalem: Some National and International Aspects," 33 Law & Contemporary Problems 169 (1968).

Leading authorities in international law also support the illegality of annexing an occupied territory. Accordingly:

> It is a rule of general international law that by mere occupation of enemy territory in the course of war the occupied territory does not become territory of the occupying belligerent, or as it is usually formulated--the occupying belligerent does not acquire sovereignty over this territory.[140]

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[136] See section IV(c), Chapter II supra.

[137] G.A. Resolutions 2253 (ES-V), U.N.Y.B. 221 (1967) and 2254 (ES-V), U.N.Y.B. 223 (1967).

[138] Schwadran, Jordan - A State of Tension 296-97 (1959); Y. Blum, in Moore, op.cit. at 299.

[139] Keesing's Contemporary Archives 1081-2 (1950-52).

[140] H. Kelsen, Principles of International Law (ed. Turner) 139 (1967).

In yet another opinion:

> Occupation does not displace or transfer sovereignty. The occupant is entitled to exercise military authority over the territory occupied, but he does not acquire sovereignty unless and until it is ceded to him by a treaty of peace (which is the commonest method), or is simply abandoned in his favour without cession, or is acquired by him by virtue of subjugation, that is, extermination of the local sovereign and annexation of his territory.[141]

Although sovereignty can also arise by way of third power recognition, Israel's sovereignty over the City of Jerusalem has not received international recognition except for a few states which, by posting their Israel ambassadors to Jerusalem, might have impliedly recognized Israel's "sovereignty" over the city.

The City of Jerusalem

Until the outbreak of the 1967 war, the status of Jerusalem rested on the original U.N. Partition Plan[142] which proposed the establishment of Jerusalem as an entity separate from the Jewish and Arab states, to be administered by the United Nations and integrated into the projected Palestine Economic Union. The Trusteeship Council was assigned the task of drawing up a statute for the City, but it was never implemented because of the outbreak of the 1948 war when the British Mandate was terminated. The Jews occupied the area of the new City which the British evacuated and from which the Arabs fled. At the same time, the Jordanian army moved in and occupied the Old City. When the Israeli-Jordanian Armistice Agreement was signed, it contemplated a special commission to handle the problems of Jerusalem, although this became impossible afterward. Both sides moved to incorporate their respective sectors in spite of the U.N. resolutions calling for internalization of the City.[143]

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[141] McNair, The Legal Effects of War 320 (1948).
[142] See note 71, Chapter II supra.

Therefore, by 1967, neither side had any strict legal title to its portion of Jerusalem. Israel's action to incorporate the Old City was no more than Jordan did in the early years of the conflict, but it was by no means legal. If the initial occupation of the Old City was defensive, Israel's announcement that "the law, jurisdiction and administration of the state of Israel were being applied to the Old City and to an enlarged East Jerusalem" was in violation of international law. The status of Jerusalem is yet to be settled and neither Jordan nor Israel, which administers the City, has good title. Until its status is determined in the overall peace settlement, sovereignty over the City is still in abeyance.

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[143] G.A. Resolution 181 (1947); G.A. Resolution 194, para. 8 (1948); and G.A. Resolution 303 (1949).

Sinai

The Sinai Peninsula has geographically been part of Egypt and, therefore, Israel's occupation of the area was merely that of a belligerent occupant. The Egyptian title was upheld in the Camp David Agreements in which the Israeli armed forces were to withdraw from the Sinai and Egypt would exercise full sovereignty up to the internationally recognized border between Egypt and mandated Palestine.[144]

The Golan Heights

The position of Golan Heights is like that of Sinai, except that the Heights legally belong to Syria. They were occupied by Israel during the war and it follows that, in the eventual settlement of peace, possession of the Heights will have to revert to Syria.

Gaza and the West Bank

These territories were both part of the originally planned Arab Palestinian state. As the events of 1948 made the creation of such a state impossible, Gaza came under Egyptian administration while the West Bank was occupied by Jordan. If armistice lines are military, which indeed they are, these territories never became part of the respective Arab states and they do not belong to Israel either.

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[144] See Section III infra.

The Negotiated Settlement

Fighting in the 1967 war ended after Israel, Egypt, Jordan, Iraq, Lebanon and Syria accepted ceasefire resolutions by the Security Council.[145] The Council's call for a ceasefire was unconditional and it rejected, as did the emergency special session of the General Assembly, all attempts to attribute responsibility for aggression to one side or another.[146] The hope for a negotiated settlement in the conflict depended on the ability of the Security Council to affirm peace within the framework of the U.N. Charter and, more particularly, on the observance of ceasefire, withdrawal of forces from occupied territories and renunciation of policies which were inconsistent with international law and which were inimical to the security of the states concerned. Five months after the war and continuous tension on both sides in the conflict, the Security Council adopted Resolution 242 which laid down a formula for what was described as "a just and lasting peace" in the Middle East.[147]

The Resolution emphasized the inadmissibility of acquisition of territory by war and affirmed that fulfilment of the Charter principles required the establishment of a just and lasting peace in the Middle East, which should include the application of both the following principles: (a) withdrawal of Israeli armed forces from territories occupied in the then conflict; and (b) termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their rights to live in peace within secure and recognized boundaries free from threats or acts of force.

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[145] S.C. Resolutions 233 (1967), 6 June 1967; 234 (1967), 7 June 1967; 235 (1967), 9 June 1967; 236 (1967) 11 June 1967; U.N.Y.B. 189-190 (1967).

[146] See note 121 supra.

[147] See note 22 supra.

The Resolution further affirmed the necessity for: (a) guaranteeing freedom of navigation through international waterways in the area; (b) achieving a just settlement of the refugee problem; and (c) guaranteeing the territorial inviolability and political independence of every state in the area, through measures including the establishment of demilitarized zones.

The Resolution also requested the Secretary General to designate a Special Representative to proceed to the Middle East to establish and maintain contact with the states concerned, in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles of the Resolution.

Egypt and Jordan agreed to implement the Resolution,[148] but Syria and the P.L.O. rejected it.[149] Israel refused it too, claiming that it would only withdraw to safe and secure boundaries to be determined by negotiations between her and Arab states.[150] Both Syria and Israel, as U.N. members, were bound to accept U.N. decisions,[151] but the Resolution does not seem to suggest that failure to comply with its provisions by either of the parties would meet with serious consequences. Indeed, the Resolution was proposed and adopted under Chapter VI of the Charter which put emphasis on pacific settlement of disputes by peaceful means. Technically, the status of the Resolution was that of a recommendation to be regarded as a series of guidelines in the direction of peace, something still as elusive today as it was in 1967.

The U.N. Mediator tried to get parties to agree on a desire for a negotiated settlement without success. The Arab states refused to negotiate and strengthened their military positions. Sporadic hostilities continued to take place in the Syrian, Jordanian and Suez frontiers in violation of the ceasefire agreements.[152] At the same time, P.L.O. guerrilla attacks in the occupied territories were on the increase.[153] The Suez Canal continued blockaded and another round of major Arab-Israeli confrontation escalating into general war was imminent throughout the early 1970s.[154] In the face of this reality, Israel decided not to withdraw from occupied territories until she could be assured of secure borders within her neighbours. What generally stalled Resolution 242 was the inability of the parties in the conflict to pursue peaceful solution in the context of concurrence of withdrawal from territories and assurance for security within recognized boundaries as envisaged by the Security Council.

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[148] See note 121 supra.

[149] See statement issued by P.L.O. rejecting U.N. Res. 242, 23 November 1967, in Y. Lukacs, op.cit. 61 at 138.

[150] The Israel communication stated: "Israel would not withdraw to the pre-5 June 1967 lines." U.N. Doc. A/8541, S/10403, 30 November 1971.

[151] Article 25 of the Charter.

From the general outlook, it seems that the Security Council and the entire United Nations offered little hope for a peaceful solution. The existing international system does not ensure the rule of law or international security by collective measures as provided in the U.N. Charter. The failure of the permanent members of the Security Council to cooperate as was envisaged under the Charter has largely eliminated the possibility of applying collective measures to preserve peace.[155] In view of this failure, the two sides in the conflict needed a new approach to show greater understanding of the real problems facing each side. Hostility, belligerency and non-recognition of neighbouring states, all being responsible for the conflict, needed self-restraint and fairness for the interest of peace and justice. When this approach failed, both sides confronted each other again in the "Yom Kippur"[156] war which is next considered.

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[152] See charges and counter-charges of ceasefire violations in S.C. debates, U.N.Y.B. 199-233 (1968).

[153] See unqualified statements of Arab leaders in support of P.L.O. guerrillas, cited by Julius Stone, "Between Cease-fires in the Middle East," in Moore, note 106 supra at 335, 346, 347.

[154] See e.g. Egyptian repudiation of the ceasefire, 14 February 1970, cited by Stone, ibid. 342.

The 1973 War

In October of 1973, Egypt and Syria launched a limited war against Israel with the hope of breaking the political stalemate engendered by the failure of Resolution 242 to come into effect. The war aimed at forcing Israel out of the territories occupied in 1967, but was illegal under the 1948 Armistice Agreements and the 1967 Security Council Resolutions. It was also illegal under Article 2(4) of the U.N. Charter which outlaws application of force in settlement of international disputes.[157] Article 2(4) of the Charter was further restated in the Friendly Relations Declaration of 1970 in which the General Assembly of the U.N. recalled the Charter's legal position, _inter alia_, that:

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[155] See generally Goodrich & Simmons, The United Nations and the Maintenance of International Peace and Security 490 ff. (1955).

[156] Sometimes called the "Ramadhan" war by Arab states.

[157] See generally E.V. Rostow, "The Illegality of the Arab Attack on Israel of October 6, 1973," 69 A.J.I.L. 272 (1975).

> Every state has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

The Declaration adds that:

> Every state likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their special character.[158]

This Declaration was reaffirmed in the 1974 U.N. Resolution on the Definition of Aggression.[159] It should also be added that the duty of states to refrain from using force is broader than is stated under Article 2(4) of the Charter, since it goes back to the matrix of international law when:

> . . . states had to pay for the luxury of avoiding the consequences of a state of war by submitting to some measure of legal regulation of the lesser means of coercion as reprisal, pacific blockade or justified intervention. Reprisals and the justified forms of intervention were

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[158] G.A. Resolution 2625(XXV), _U.N.Y.B. 788_ (1970).
[159] See note 103 supra.

> bounded by the requirement of proportionality to the danger threatened and the restricted object of the use of force.[160]

Since the war of 1967, both the Arab states and Israel were confronted with a difficult situation in which the Arabs feared that the Israelis would never withdraw from any lands which they conquered and the Israelis in turn feared that the Arabs would never make peace. In order to balance the positive outcome from the deadlock the Security Council Resolution 242 should have been implemented in whole, because it contained a reciprocal formula for Arab states to make peace with Israel in return for the latter's withdrawal from occupied territories. However, as already observed, the P.L.O. and Syria were adamant in refusing to implement Resolution 242 from the beginning and, as a result, Israel was not prepared to risk her sovereignty by making unilateral concessions.

The controversy of course was--and still is--that the Palestinian Arabs were robbed of their territory when the state of Israel was established at the end of the British Mandate. Since Arab states never recognized the existence of Israel, it became difficult, it would appear, to negotiate peace with a state which they do not recognize.

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[160] I. Brownlie, International Law and the Use of Force by States 28 (1963).

Security Council Resolution 338 of October 22, 1973,[161] called upon both parties to stop fighting and start implementation of Resolution 242 after the ceasefire. Both parties eventually agreed to a ceasefire after yet another Security Council Resolution 339 of October 23, 1973.[162] However, Resolution 242 proved hard to implement because of the failure to resolve the problem of Palestine which the Arab states considered to be at the centre of any peace negotiations. It was not until the Egyptian-Israeli peace treaty of 1979 when it appeared that peaceful solution of the conflict is possible if it could be followed by other parties. The Treaty was negotiated on the basis of Resolution 242 which remains relevant to date for further peace negotiations.

Section III

The Egyptian-Israeli Peace Treaty

The Khartoum Arab League Summit Resolution of no peace, no recognition and no negotiation with Israel,[163] if binding only to League members and by no means compatible with the U.N. Charter,[164] was flaunted by Egypt when it decided to enter into negotiations with Israel to end their long-standing state of belligerency. Egypt had three policy options to consider before negotiations began: (a) a military option; (b) a no-war/no-peace option; and (c) a political settlement option.[165] After four military defeats (1948, 1956, 1967 and 1973) at the hands of Israeli forces, it was likely that Egypt would accept the _fait accompli_ that Israel's military strength was overwhelming and, accordingly, she opted to negotiate with Israel; but much to the chagrin of other Arab states which, until then, maintained the rejectionist position that Israel was not a sovereign state and called for the substitution by a Palestinian state.[166]

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[161] U.N.Y.B. 213 (1973).

[162] Ibid.

[163] Resolution 3, The Arab League Summit Conference Resolutions, Khartoum, Sudan, 1 September 1967, Y. Lukacs, op.cit. 213.

[164] Article 2(2), (3) and (4).

The first step in the peace negotiation process led to a limited agreement on disengagement of forces in January of 1974[167] and to the more comprehensive Sinai Interim Agreement of September, 1975.[168] The legal significance of this Agreement was the Egyptian renunciation of using force to recover lost territories. Both sides pledged:

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[165] M.C. Bassiouni, "An Analysis of Egyptian Peace Policy Toward Israel: From Resolution 242 (1967) to the 1979 Peace Treaty," _12 Case Western Reserve Journal of International Law 7_ (1980).

[166] For a discussion of Arab opposition to Egyptian policies, see F. Ajami, "Between Cairo and Damascus," _54 Foreign Affairs 444_ (1976).

[167] Egypt-Israel: Agreement on the Disengagement of Forces, January 18, 1974, _13 I.L.M. 23_ (1974).

[168] Egypt-Israel: Agreement on the Sinai and Suez Canal, 4 September 1975, _14 I.L.M. 1450_ (1975).

> . . . to reach a final and just peace settlement by means of negotiations called for by Security Council . . . and . . . not to resort to the threat or use of force or military blockage against each other.

The Interim Agreement paved the way for another set of agreements concluded at Camp David, U.S.A., in 1978.

The Camp David Agreements

The Camp David Agreements consist of two documents executed on September 17, 1978.[169] One is "A Framework for Peace in the Middle East," and its preamble states that "the agreed basis for a peaceful settlement of the conflict between Israel and its neighbours is United Nations Council Resolution 242 in all its parts." The preamble also espouses the U.N. Charter provisions that:

> To achieve a relationship of peace, in the spirit of Article 2 of the United Nations Charter, future negotiations between Israel and any neighbour prepared to negotiate peace and security with it are necessary for the purpose of carrying out all the provisions and principles of Resolutions 242 and 338.

The principal features of a framework for peace are consideration of the occupied territories of West Bank and Gaza, relations between Egypt and Israel, and associated principles which should apply between Israel and each of its neighbours--Egypt, Jordan, Syria and Lebanon.

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[169] Egypt-Israel-United States: Camp David Agreements, 17 I.L.M. 1466 (1978).

With respect to the West Bank and the Gaza Strip, the parties agreed to a transitional period not exceeding five years in order to ensure a peaceful and orderly transfer of authority to the inhabitants.[170] They also agreed that "Egypt, Israel, Jordan and the representatives of the Palestinian people should participate in negotiations on the solution of the Palestinian problem in all its aspects,"[171] although Jordan's inclusion--a third state not represented in the negotiations--amounted to interference in the matter essentially within the Jordanian competence and, as such, it was not binding upon her in any way. The principle of self-government by the inhabitants of the territories and the security concerns of the parties involved in the negotiations were also to be given weight in future negotiations.

On Egyptian-Israeli relations, the Parties undertook to settle any disputes in accordance with the procedures set forth in Article 33 of the U.N. Charter.[172]

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[170] Ibid., Section A1.para.(a) at 467.

[171] Ibid., Section A1.para.(b).

[172] Section B, para.1. Article 33(1) of the U.N. Charter provides that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

The parties also agreed to attempt to conclude a peace treaty within three months of the signing of the Camp David Agreements.[173]

In the "Framework for the Conclusion of the Peace Treaty,"[174] the parties agreed to a phased withdrawal of Israel armed forces from the Sinai and to the exercise of full Egyptian sovereignty "up to the internationally recognized border between Egypt and mandated Palestine."[175] They also agreed to Egyptian use of airfields evacuated by the Israelis for civilian purposes and to the right of free passage by Israeli ships through the Gulf of Suez and the Suez Canal. The Strait of Tiran and the Gulf of Aqaba are recognized in the Agreement as international waterways open to all nations.

Although the "associated principles" of the Agreement provided that they should apply to peace treaties between Israel and each of its Arab neighbour states, the fact that these states were not parties to this Agreement means that they are not bound by it anyhow.[176] The principles suggested include: granting full diplomatic recognition; abolishing economic boycotts; guaranteeing each other's citizens due process of law; exploring possibilities for economic development; establishing claims commissions for the mutual settlement of all financial claims; and requesting the U.N. Security Council and its permanent members in their individual capacities to underwrite the peace treaties and to ensure respect for their provisions.[177]

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[173] Section B, para. 2.
[174] 17 I.L.M. at 1470 (1978).
[175] Ibid.
[176] See note 171 supra.

As far as the P.L.O. is concerned, the Framework for Peace Agreements was flawed in two aspects: The autonomy language of the agreement regarding the West Bank and Gaza was ambiguous and the P.L.O. was not recognized as the sole representative of the Palestinian people in future negotiations. It is not clear whether the autonomy language of the agreement regarding the West Bank and the Gaza Strip intended to preclude the ultimate Palestinian statehood in future negotiations. The phenomenon of autonomous territory implies complete subservience to another governmental entity and dependence on its whims.[178] If this was the kind of autonomy for the occupied territories envisaged by the parties in the Agreements, it certainly would be opposed, as it was, by the P.L.O. since it does not lead to the foundation of a Palestinian state in which people can exercise their complete sovereign rights. Although it is indisputably correct that the idea of autonomy is a means of protecting minority rights, in the case of Palestinians they are fighting against a limited measure of these rights. They want to establish a territorial government with the full participation of the population in the economic, social and cultural development.[179]

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[177] Ibid. at 1469.

[178] L.B. Sohn, "The Concept of Autonomy in International Law and the Practice of the United Nations," 15 Israel Law Review 190 (1980).

Egypt was also condemned by Arab states on the framework agreement by side-stepping P.L.O. recognition as the sole representative of the Palestinian people. The 1974 Regional Arab League Summit in Rabat made a commitment to recognize the P.L.O. as the "sole legitimate representative of the Palestinian people"[180] and Egypt was expected to reflect that regional commitment in the Israeli-Egyptian Agreements, especially on the future of West Bank and Gaza.[181] In a similar incident way back in 1950, after Jordan had indicated that it might enter into a separate peace with Israel, the League of Arab States adopted a Resolution on April 13, 1950, stating that any Arab state attempting to enter into a peace treaty with Israel would be repudiating its obligations as well as the Provisions of the League Pact. Article 7, para. 1, of the League of Arab Pact makes the Resolution mandatory.[182]

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[179] See the P.L.O. Covenant, note 11 supra. Also G.A. Resolution 567(VI) of 18 January 1952 which emphasized three crucial factors in the formation of autonomous regimes:

1. Territorial government: Free from control or interference by the government of another state in respect of the internal government (legislature, executive, judiciary) and administration of the territory.

2. Participation of the population: Effective participation of the population in the government of the territory by means of an adequate electoral and representative system.

3. Economic and social jurisdiction: Complete autonomy in respect of economic and social affairs.

These factors formed the basis for adoption of G.A. Resolution 1514(XV) on 15 December 1960, which called for granting independence to colonial and non self-governing territories. While Israel's presence in the occupied territories is different from colonial administration, it is similar on denial of self-rule to the Palestinians.

Egypt defended her policy as being in conformity with the U.N. Security Council Resolutions 242 and 338, but there is no doubt that her policy toward the P.L.O. was somewhat compromised. As a matter of fact, the P.L.O. has since claimed that the Camp David Agreements condone the Israeli settlements in occupied territories and that the municipal leadership scheme for autonomy will prevent the establishment of a Palestinian sovereign state in that area. In addition, the P.L.O. felt that a five-year transition plan would erode the political will and ability of the Palestinian people to achieve their goal of statehood.[183] Indeed, for almost ten years now since the Agreements were signed, the hope for resolving "the Palestinian problem in all its aspects"[184] is still elusive.

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[180] The 1974 Arab League Summit in Rabat (Morocco) recognized the P.L.O. as the "sole legitimate representative of the Palestinian people." Subsequently, the United Nations invited the P.L.O. to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings. G.A. Resolution 3210(XXIX), 14 October 1974. U.N.Y.B. 226 (1974).

[181] See note 190 infra.

[182] See al-Khadem, "The Role of the League of Arab States in Settling Inter-Arab Disputes," 13 Egyptian Rev. Int'l Law (1976); See also the Khartoum Summit Resolution, note 163 supra.

The Peace Treaty between Egypt and Israel

Since the Egyptian-Israeli Peace Treaty[185] did not deal at length with the Palestinian problem, only those provisions pertinent to the foregoing analysis of the Palestine-Israel conflict will be considered. Issues concerning the status of the Palestinian people, and the situation in the West Bank, the Gaza Strip and Jerusalem were addressed in the Preamble and in the letters attached to the treaty between President Sadat, Prime Minister Begin and President Carter. All parties recognized the need to create a first step toward a comprehensive peace based on

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[183] See the Political and Organizational Programme, Palestinian National Council, Damascus, 23 January 1979, Lukacs, op.cit. 187-192.

[184] See Section A.1, para.(b), of the Agreements.

[185] Egypt-Israel: Treaty of Peace, March 26, 1979, 18 I.L.M. 362 (1979).

Security Council Resolutions 242 and 338 and on the Camp David Agreements.

The most important feature of the treaty is the termination of the state of war between Egypt and Israel.[186] The parties also agreed to apply between them the U.N. Charter provisions and the principles of international law governing international relations among states in times of peace.[187] They agreed not to enter into any obligation in conflict with the treaty,[188] and specified that in the event of a conflict between an obligation under the treaty and any other obligation, the former would be binding and implemented.[189]

Egypt was sharply criticized by the Arab League for accepting Article VI, para. 5, for it contradicts her prior commitments to the Arab League Pact,[190] her obligations to the P.L.O.[191] and numerous U.N. resolutions on the rights of the Palestinian people. There were two U.N. resolutions passed in light of the Camp David Agreements, both of which ostensibly oppose a bilateral separate approach between Egypt and Israel. The General Assembly Resolution 33/28A (1978) named "Question of Palestine" declared, inter alia, that:

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[186] Treaty Article 1, para. 1.

[187] Treaty Article 111, para. 1.

[188] Treaty Article VI, para. 4.

[189] Treaty Article VI, para. 5.

[190] See Final Statement of the Arab League Summit, Baghdad (Iraq), 5 November 1978 and Resolutions of the League Summit, Baghdad, 31 March 1979. Lukacs, op.cit. 229-236.

[191] See note 180 supra.

> The validity of agreements purporting to solve the problem of Palestine requires that they be within the framework of the United Nations and its Charter and its resolutions on the basis of the full attainment and exercise of the inalienable rights of the Palestinian people, including the right of return and the right to national independence and sovereignty in Palestine, and with the participation of the Palestine Liberation Organization.

In another General Assembly Resolution 33/29 (1978) named "The Situation in the Middle East" it reaffirmed, inter alia, that:

> Until Israel withdraws from all occupied Palestinian and other Arab territories, until the Palestinian people attains and exercises its inalienable national rights, a comprehensive, just and lasting peace in the Middle East, in which all countries and peoples in the region live in peace and security within recognized and secure boundaries, will not be achieved.

However, apart from the lack of fully addressing the Palestinian question, the treaty unequivocally stated that it was applying provisions of the U.N. Charter and especially implementing Security Council Resolutions 242 and 338. Egypt's action was in keeping with her obligations under the Charter and on her commitment to the League of Arab States, Article 103 of the U.N. Charter provides that:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Since the position of the League of Arab states over the Arab-Israeli conflict was at variance with the U.N. Charter, it therefore follows, naturally, that the latter had to prevail.

For the Palestinians, the Egyptian-Israeli peace treaty offered no real hope for solution of their problem. It has been argued that:

> The political judgement question remains whether the 1979 Treaty and the 1978 Camp David Agreements, all of which are to be construed in pari materie, are susceptible of being interpreted only as a stage in the process of fulfilling Palestinian self-determination and national independence or do they foreclose this possibility. The answer depends on whether the creation of new conditions on the West Bank and Gaza could ripen into a sovereign Palestinian state, or whether such conditions would in fact preclude such a possibility. Existing conditions cannot produce the intended effect Egypt had in mind when entering into the Treaty.[192]

This is correct when looking at the events which have taken place in the occupied territories since the peace treaty was signed. There has been increasing Jewish settlements in the West Bank and Gaza[193] with the apparent intention of permanently occupying these territories. Israel continues to refuse to negotiate with the Palestine Liberation

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[192] Bassiouni, op.cit. 25.
[193] See section II(d), Chapter IV infra.

Organization, in as much as the latter continues to uphold for Israel's extermination. Unless both sides break new grounds for a negotiated settlement of the conflict, the Egyptian-Israeli "Framework for Peace" and the Peace Treaty itself no longer seem to be the basis for further discussion to end the conflict.

CHAPTER IV

POST-WAR OUTLOOK IN THE ARAB-ISRAELI CONFLICT

Section I
The Status of Occupied Territories

Belligerent Occupation

Occupation of a foreign territory by a belligerent state entails introduction of effective military control over held areas. Usually fighting will have stopped by means of either a ceasefire, armistice or total surrender by the enemy. Depending on the state of calmness in the occupied areas, international law prescribes that the occupant, as far as possible, preserve laws and institutions existing _ante-bellum_.[1] This rule is the necessary corollary of the principle that occupied territory not be annexed but remain an issue for negotiation in anticipated peace agreement. Under international law, it is the ousted power who retains sovereignty, albeit in abeyance, over the held territory.[2]

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[1] Article 64 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949. _75 U.N.T.S. 287_.

[2] L. Oppenheim, _2 International Law (ed. Lauterpacht) 618_ (1952).

In the interim, the occupying power is to desist from taking actions tending to promote vested interests in favour of indefinite retention.

Operative laws of belligerent occupation include the 1907 Hague Convention IV, Respecting Laws and Customs of War on Land,[3] along with the Geneva Convention IV, 1949.[4] Article 42 of the Hague Regulations (annex to the Convention) provides that:

> The territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[5]

Article 43 of the same Regulations states that:

> The security of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Similar legal content is contained in Article 47 of the Geneva Convention IV, which provides that:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of said territory, nor by any agreement concluded between the

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[3] Laws and Customs of War on Land (Hague IV), signed 18 October 1907, Schindler & Toman, The Laws of Armed Conflicts 63 (1973).

[4] See note 1 supra.

[5] Hague Convention IV, note 3 supra.

> authorities of the occupied territories and the occupying power, nor by any annexation by the latter of the whole or part of the occupied territory.[6]

There is a legal dispute on the substance of these provisions as applicable to the management of territory under occupation. While the occupying power has the right and an obligation to restore order and normal economic and social life in the occupied territory,[7] the dispute arises when the occupant introduces legislative and institutional change going beyond the restoration of order. As such, it has been suggested that the permissible limits of the occupant's authority to legislate and introduce institutional reform be limited to "minor" rather than "fundamental" changes.[8] However, there are difficulties in applying the dichotomy because circumstances justifying such changes may not be appreciated by the people under occupation, let alone the international community. Another difficulty yet arises where changes in fundamental laws and institutions result into violation of internationally recognized standards of human rights. But since international law cannot provide guidelines for specific exigencies, the occupation power therefore undertakes institutional and legal reforms under the rebuttable presumption of illegality. This scenario applies to the case of Israel in the occupied territories of West Bank and Gaza, herebelow examined.

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[6] See note 1 supra.

[7] Oppenheim, op.cit. 434, 436-7.

[8] J. Stone, Legal Controls of International Conflicts 641 (1959).

Legal Status of the West Bank and Gaza Strip

According to the principle of inadmissibility of acquisition of territory by war,[9] and the position taken by the United Nations, the status of the West Bank and Gaza is that of occupied territories.[10] Israel as a belligerent occupant is therefore under a duty to administer the territories in accordance with the existing laws and institutions save for changes that may be dictated by the exigencies of military administration. Israel is a signatory to the Fourth Geneva Convention[11] and therefore bound by its provisions; but, ironically, it has taken the position that the Convention in question is not applicable to the Israeli occupation of the West Bank and Gaza. In 1977, Israel declared before the General Assembly of the United Nations that:

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[9] See notes 126 and 128, Chapter III.

[10] Security Council Resolution 242(1967) urged withdrawal of Israel armed forces from territories occupied during the conflict, U.N.Y.B. 257 (1967). Also, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Resolution 2526(XXV) 1970 proclaims, *inter alia*, that:

> The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

[11] Signed by Israel, 8 December 1949 and ratified 6 July 1951, M.J. Bowman & D.J. Harris, *Multilateral Treaties Index and Current Status 154* (1984).

> Since Jordan never was a legitimate sovereign in "Judea and Samaria," the provisions of the Fourth Geneva Convention--including those of its Article 49, which were intended to protect the rights of the "legitimate sovereign," do not apply in respect of Jordan. Therefore Israel is not affected by these provisions, and need not consider itself restricted by them. In other words, Israel cannot be considered an "occupying Power," within the meaning of the Convention in any part of the former Palestine Mandate, including "Judea and Samaria" . . . . As a general principle of international law it is both vital and correct to say that the acquisition of territory by war is inadmissible. But . . . the distinctions between aggressive conquest and defensive conquest, between taking of territory legally held and illegally held, become no less vital and correct than the central principle itself.[12]

These remarks ignore the fact that even if Jordan was not, and rightly so, a rightful sovereign in the West Bank or as was Egypt in the Gaza Strip, definitely sovereignty over these territories must have been lying somewhere; they were not terra nullius.[13]

Before Jordan and Egypt occupied these territories in 1948, they were part of a Mandated Palestine under

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[12] See G.A. Debate, 14 U.N. Monthly Chronicle 6-7 (1977).

[13] See R.Y. Jennings, The Acquisition of Territory in International Law 78 et seq. (1963).

British rule. According to the separate opinion of Judge McNair on the *International Status of South-West Africa*, "sovereignty over a Mandated Territory [is] in abeyance,"[14] and will revive and vest in a new State. The envisaged Palestine state in the 1947 U.N. Partition Plan failed to take off but the West Bank and the Gaza Strip were not transferred to any sovereign Power and therefore Israel's indefinite occupation of the territories has no justification in law.

Israel's wrong policy, that the territories are not occupied, was contradicted by Proclamation No. 3 of June 7, 1967, in which the military forces and their office in the occupied territories were supposed to apply the terms of the Fourth Geneva Convention and, in case of any contradiction between this Proclamation and the said Convention, the terms of the Convention must have been followed.[15] After realizing that applying the Convention would mean accepting the position of a belligerent occupant, Israel repealed this Proclamation by Military Order No. 144 of October 22, 1967.[16] Since then, Israel has made fundamental changes in the governmental system of these territories in defiance of the Geneva Convention.[17]

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[14] *I.C.J. Reports 150* (1950).

[15] Article 35 of Proclamation No. 3 provided that the military forces and their office must apply the terms of the Fourth Geneva Convention and that if there should be any contradiction between this Proclamation and the said Convention, the terms of the Convention be followed. United Nations, *The Legal Status of the West Bank and Gaza 27* (1982).

[16] *Ibid.*

Changes in the Governmental System of the Occupied Territories

Legislative Changes

According to the Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories during the Egyptian administration in the Gaza Strip:

> The Legislative Council of the Gaza Strip set up before the aggression of 5 June was composed of members who were freely elected among qualified Palestinians and who were true representatives of the Palestinian people. The fact that the Chairmanship of the Palestinian Legislative Council was assumed by a Palestinian citizen opened a door for the Palestinian personality to assert itself and to prove its existence in the Arab region. The Council showed beyond doubt that the Palestinian people living in the area had been trained in self-government and had developed its capacity to make laws compatible with the interests of the society.[18]

In the case of the West Bank, the legislative authority was in the hands of the central government of Jordan, but municipal councils had a legislative role confined to ordinances of minor patterns.[19]

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[17] See Article 43 of the Convention.

[18] U.N. Doc. A/8089 (1970) at 24.

[19] A. Gerson, Israel, the West Bank and International Law 115-16 (1979).

Following the occupation of the West Bank on June 7, 1967, the Israel military command published Proclamation No. 2 concerning the Assumption of Government by the Israeli Defence Forces in which Section 3 stated that:

> Every governmental, legislative, appointive and legislative power in respect of the region or its inhabitants shall henceforth vest in me [the West Bank Commander] alone and shall only be exercised by me or a person appointed by me for the purpose or acting on my behalf.

According to the Hague Regulations and the Fourth Geneva Convention, the occupant may promulgate new legislation only for imperative reasons of public order or military security. Article 64 of Geneva Convention IV emphasizes that:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and the necessity for ensuring the effective administration of justice, the Tribunals of the occupied territory shall continue to function in respect of all offences covered by said law.

Article 64 refers only to "penal law," but it has been argued that its interpretation implies civil legislation as well. According to official commentary to the Fourth Geneva Convention:

> The idea of continuity of the legal system applies to the whole of the law--civil law and penal law--in the occupied territory. The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer "a

> contrario" that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution.[20]

In spite of this commentary, it is doubtful whether the military authorities may uphold the constitution which they had sought to remove in the first place. The Israeli government, while purporting to amend the Jordanian law, in some cases the military orders have created new laws which make it possible for it to exercise full power in the occupied territories, thus avoiding the problems which formal annexation would entail. The total amount of military orders is overwhelming and each of them is equivalent to a new law.[21] Attempts to challenge the Area Commander's legislative powers have been unsuccessful because the Israeli government adopted this system solely because:

> It avoided giving to Arabs of the West Bank the legal rights of Israeli citizens, rights which are denied to them under the occupation. Whenever the question arose, the claim would still be made that it is Jordanian law that is being applied to the West Bank. The fact that this body of law has been altered beyond recognition is not mentioned or generally known.[22]

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[20] J. Pictet, Fourth Geneva Convention Relative to the Protection of Civilians in Time of War (Commentary, I.C.R.C.) 335 (1956).

[21] R. Shehadeh & J. Kuttab, The West Bank and the Rule of Law 103 (1980).

[22] Ibid.

Indeed, Israel's ruthless handling of the current unrest in the occupied territories and the deportation of Palestinians from their homeland while claiming to apply Jordanian law is the latest proof of the irrelevance of this argument. It leaves the international public to wonder whether there is law in any jurisdiction on earth, except in Israel, which provides for expulsion of a citizen from his homeland by reason of any offence committed, and certainly not according to Jordanian law. Since December of 1987, Palestinian uprisings against Israel occupation have been met with brutal killings of more than 200 Palestinians, beatings, imprisonment and expulsion from their homeland.[23]

Some crucial restrictions on basic rights introduced by Israel through military orders in these territories include restrictions on freedom of movement, freedom of assembly and collective punishment. On freedom of movement, Military Order No. 3[24] gives the military commander power to declare "closed areas" and in consequence forbids movement into or out of such areas without a permit. The whole of West Bank is a closed area, therefore a permit, given or denied at the discretion of the military governor, is needed to leave the area. However, it is believed that the reasons for denying a permit sometimes appear arbitrary, often used as an opportunity for the military government to exert pressure on a particular person, especially those who hold views "unacceptable" to the Israel government.[25]

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[23] See e.g. *The Globe and Mail* (Toronto), January 27, 1988, p. A1; February 2, 1988, p. A1; February 3, 1988, p. A10; February 4, 1988, p. A3; April 12, 1988, p. A1.

[24] Article 70, this Order was later replaced by Military Order No. 378.

Military Order No. 101 concerning Prohibition on Incitement and Adverse Propaganda[26] prohibits, among other things, the gathering or convening of people without a permit for a march or a meeting where it is possible to hear a speech or talk on a political subject or a subject which may be considered political. This Order was brought to test in the Abu Dies Case[27] in which eighty students who gathered for a silent sit-in to protest the closure of their school were convicted of illegal assembly contrary to the provisions of this Order even though there was no allegation that any political speech was given or heard. The Deputy Attorney-General, testifying before the Israeli High Court on July 14, 1980, defended the action by simply stating that "where there are schools, there will be demonstrations, stone-throwings, raising of flags and therefore a threat to security." Definitely such draconian measures engenders fear, frustration and hatred leading to exacerbation of the situation in the territories, and most Palestinians feel that such an Order is unnecessarily harsh.

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[25] Shehadeh, op.cit. note 21 at 71-72.

[26] Reprinted in Appendix, Shehadeh, ibid. 216.

[27] Abu Dies Arab College, Case No. 322/8 (unpublished) in Shehadeh, ibid. 89.

Collective punishment is prohibited by the Fourth Geneva Convention. By Article 33:

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.

This kind of punishment in various forms has been part of the Israeli policy in the occupied territories. Property destruction[28] and demolition of houses[29] are pertinent examples of collective punishment. One of the rare "progressive" legislative changes introduced in the occupied territories is the abolition of the death penalty,[30] although technically this step is in breach of

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[28] M. Burhan & W. Hammad, "The Culprit, the Targets and the Victims," in Moore, note 2 supra at 369-70.

[29] J. Stone, "Behind the Cease-Fire Lines: Israel's Administration in Gaza and the West Bank," in Moore, ibid. 405-6; M. Shamgar, "The Observance of International Law in the Administered Territories," in Moore, ibid. 386-7; Shehadeh, op.cit. 62-63.

[30] Military Order No. 268 of 24 July 1968 states: "Whenever the law makes obligatory the passing of a death sentence, the court shall pass a sentence of life imprisonment, but if the law (permits but) does not make obligatory the passing of a death sentence, the court may pass a sentence on the accused of life imprisonment or of imprisonment for a specified period."

Article 64 of the Geneva Convention which restricts the right of an occupant in legislative matters. It may still be argued that even this "progressive" change is meaningless as a practical matter if people continue to be ruthlessly killed in the uprising or receive long jail sentences on minor offences as a substitute for the death penalty.

Executive Changes

During the Jordanian administration of the West Bank, municipal councils were composed of elected representatives who played a substantial political role and assumed important responsibilities due to the absence of a national government. Under Article 41(a) of the Jordanian municipal law, municipal government authorities would act in 40 different areas.[31] In the Gaza Strip, Egyptian authorities empowered the Executive Council of the territory to exercise powers within the limits of the laws adopted by the Palestinian legislative power.

The first elections to be held in the West Bank under Israel occupation took place in 1972[32] and were again held in towns and cities in 1976. These latest elections brought P.L.O. candidates into power as municipal councilors and mayors, but it was later feared by Israel that similar elections in the future might breed a number of political leaders to play a national role in the West Bank. According to one source:

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[31] United Nations, The Legal Status of the West Bank and Gaza, note 16 at 29.

[32] Ibid.

> Such new mayors . . . represent a new class of sophisticated, educated, nationalistic Palestinians of the West Bank who . . . are determined to find a solution to their problems based on the right of self-determination.[33]

Consequently, municipal elections in the West Bank have been indefinitely suspended on allegations that the voting would endanger the Camp David Peace Agreement.[34] This is not correct, however, because the Camp David Agreements provided for a transitional period not exceeding five years in order to ensure a peaceful and orderly transfer of authority to the inhabitants and therefore elections would seem to have been in preparation for such transfer of authority to Palestinians in the occupied areas.[35]

In the Gaza Strip, the last municipal election took place in 1946. From 1948 to 1967, it was under Egyptian administration and no elections were held. Egyptian authorities favoured an appointive system of local government and, in early 1967, they appointed a mayor. Soon after the war he was replaced by an Israeli military officer with primary concern and main policy focused on strengthening the Israeli occupation in the area.[36] Although the Israeli authorities appointed an Arab mayor following the popular demand, both West Bank and Gaza municipal governments function under the direct control and authority of the military government. While this is the case in all occupied territories anywhere, the problem which arises in the foregoing is that:

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[33] E.A. Nakhleh, The West Bank and Gaza, Toward the Making of a Palestinian State 11 (1979).

[34] New York Times (New York), 27 March 1981 at 7.

[35] On transfer of authority to Palestinians, see Egypt-Israel-United States: Camp David Agreements, 17 I.L.M. 1466 (1978).

> Lip service is often paid by the military government to either the 1934 municipal law (in Gaza) or the 1955 Jordanian law (in the West Bank) but in practice municipal governments in both regions derive their authority to govern from the military government as dictated by the orders and decrees of the regional commander. The ubiquity of government by fiat has rendered superfluous municipal authority by law.[37]

Indeed, in May, 1980, the Israeli government deported to Lebanon the mayors of Hebron and Halhoul and the Sharia judge of Hebron on suspicious ground that they were accomplices to the killings of six Israelis in the West Bank city of Hebron. This action not only demonstrated Israel's disregard of municipal governments in the occupied territories, but also provisions of the Fourth Geneva Convention. It is provided under Article 49(1) of the Convention that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying power, or to that of any other country, occupied or not, are prohibited, regardless of their motive." As a result of this action, the Security Council adopted Resolutions 468[38] and 469[39] on May 13, 1980, in which it deplored Israel's action. The following month in June of 1980, the mayors of Nablus, Ramallah and Al Bireh were the target of an assassination attempt by unknown killers, but more likely with Israeli connivance, and two of them were badly injured. The Security Council issued Resolution 471[40] in which it condemned the assassination attempt and urged Israel to respect Article 17 of Geneva Convention IV, which provides that:

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[36] Nakhleh, op.cit. 15.
[37] Ibid. 17.

> Protected persons are entitled, in all circumstances, to respect for their persons.... They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof.[41]

It has therefore become obvious that Israel's interference in the activities of municipal governments has fundamentally changed their functions in the occupied territories and reduced people's ability to control their own affairs.

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[38] U.N.Y.B. 411 (1980).
[39] Ibid. 413.
[40] Ibid. 414.
[41] See note 1 supra.

Changes in the Judiciary

Judicial systems are generally permitted to function during belligerent occupation according to Article 64 of the Fourth Geneva Convention, which makes specific reference to the continuation of the judicial system in an occupied territory. It states, inter alia, that:

> . . . subject to latter consideration [security of the occupant forces] and the necessity for answering the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect to all offences covered by said laws.[42]

Notwithstanding this provision, Article 54 of the same Convention permits the Occupying Power to remove judges and public officials from their posts, but this is only limited to any work which would involve them in the obligation of taking part in military operations.[43] According to one commentator, "the suspension of judges must be limited to instances of insubordination, express or indirect and that in other cases they must be permitted to serve with their independence unimpaired."[44] The rational justification for the discretion of the Occupying Powers to remove judges and public officials is that:

> [i]n view of conditions usually existing during belligerent occupation (including military

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[42] Ibid.
[43] Ibid., Paragraph B, Article 51.
[44] Oppenheim, op.cit. 447.

> security regulations), native courts are at best ill-equipped to decide, on scanty factual information, whether or not a given order or act of an occupant conforms to necessity. Hence when the question of the need for the occupant's act, as distinct from its conformity to conventional law is raised, the courts ordinarily will wisely hesitate to hand down a decision and will prefer to allow claims based on the occupant's act to await a future settlement by an impartial tribunal.[45]

This explanation conforms with the Israeli Military Command Proclamation No. 2 referred to above. Section 2 of the Proclamation stated that:

> All laws which were in force in the area on 7 June 1967, shall continue to be in force as far as they do not contradict this or any other proclamation or order made by me [the West Bank Area Commander] or conflict with the changes arising by virtue of the occupation of the Israeli Defence Forces of the area.

An important change introduced by Israeli authorities was the creation of the Objection Committee under Military Order No. 172 of November 22, 1967.[46] The activities of this committee might be termed as that of an appellate court in civilian administration. It is composed entirely of military officers with exclusive jurisdiction to hear objections against decisions made regarding a large list of subjects such as expropriation of land, payment of taxes, pension rights, etc.[47] The Committee is not bound by the rules of evidence or procedure and it decides on its own procedural guidelines with its decisions final and conclusive.

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[45] Glahn, The Occupation of Enemy Territory 110 (1957).
[46] Shehadeh, op.cit. 30.
[47] Ibid.

Shortcomings of the Objection Committee, according to lawyers and litigants, is to submit objections to decisions which are often based on the policies of the occupier, to a Committee appointed by the same authority which has laid down the policy. Although such a Committee would have functioned better under normal peace-time situations, the principle of natural justice nemo debet esse judex in propria causa is the same even in belligerent situations that one cannot be a judge of his own cause. Moreover, the maximum secrecy in which the proceedings are conducted without publication makes it impossible to review past precedent or make reference to earlier decisions.

Military Order No. 164[48] limited the independence of the judiciary after making alterations to Article 102 of the Jordanian Constitution which guarantees the right of all citizens to bring cases in the regular courts, civil or criminal, against the government or any of its departments. This Order forbids the courts of the West Bank to hear any case or issue any order or decision against any of the following: The state of Israel and its branches and employees; the Israeli Defence Forces and its members; the authorities which have been appointed by the Area Commander or those delegated by him to work in the area; persons employed by such authorities: or whoever works in the service of the Israeli army or is empowered to issue a permit allowing the courts to hear any specific case. The Order insulated virtually every person, particularly the Israeli citizens, from the rigor of the law. Directly or indirectly, the Order intended to condone every wrong doing committed by the Israeli government in the occupied territories. Considering the fact that hardships under military rule are more formidable than in a civilian government, the Order deprived occupied people the only right they could enjoy by taking to courts those suspected of abusing the power of military occupation.

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[48] Ibid. 33.

The numerous military orders issued by Israel since 1967 have, strictly speaking, completely replaced the hitherto existing judicial system in the occupied territories. Both Jordanian and Egyptian judicial procedures left behind have been eroded, and what is left is a novel judicial system without human rights guarantee and cloaked in the preservation of the Jordanian legal system prevailing before June, 1967, but which have been completely amended or suspended in violation of the Hague and Geneva Conventions.

Israeli Settlements in Gaza and the West Bank

Since 1967, Israel has been establishing military and civilian settlements in the occupied territories, claiming the right to do so on the ground that these territories are part of ancient Israel.[49] This claim, without any legal validity, has involved expropriation of Arab lands which have subsequently been transferred to Jewish settlers from Israel.[50] The settlements established are of two types: civilian and military. The Israeli authorities argue that the purpose of military settlements is to increase Israel's security and provide a firm basis for its demand for peace with defensible borders.[51] While this argument may appear plausible, there is no genuine explanation regarding the establishment of civilian settlements known as kibbutz and moshav.[52] In most cases, military settlements have often been transformed into civilian settlements by first establishing the former as military disguise "to avoid foreign policy problems and domestic opposition."[53]

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[49] See speech of the Israeli Permanent Representative to the U.N., note 12 supra.

[50] United Nations, Israeli Settlement in Gaza and the West Bank 26 (1982).

[51] For example, in 1977, the Minister of Social Affairs reaffirmed in an interview: ". . . if you sum up the empirical behaviour of the government of Israel in determining the points of settlement, you will find that they add up to a concept: that is, settlements are placed in strategically important areas along existing borderlines or in the vicinity of areas likely to become borderlines in the future." Report of the National Lawyers Guild (1977 Middle East Delegation), Treatment of Palestinians in Israeli-Occupied West Bank and Gaza 10 (1978).

[52] Kibbutz means collective settlement owned communally by members and organized on cooperative principles; moshav means group of agricultural smallholdings working cooperatively and based on nationally owned land.

Successive Israeli governments, by consistently encouraging and contributing to the settlement policy argue that it sees the West Bank and Gaza as part of the natural boundaries of the Jewish homeland or biblical Israel. According to the 1977 Report of the National Lawyers' Guild[54] entitled Treatment of Palestinians in Israeli-Occupied West Bank and Gaza:

> Under this "homeland" doctrine, the Israeli Government regards the Palestinian inhabitants of the West Bank and Gaza as being there by sufferance only. Prime Minister Menachem Begin and others refer to the West Bank as "Judea and Samaria"--the ancient names of the region. Israeli Ministry of Tourism maps obtained by the delegation show the West Bank and Gaza as part of Israel, with no indication of their status as occupied areas. The maps refer to the West Bank as "Judea" and "Samaria."[55]

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[53] Report of the National Lawyers Guild, loc.cit.

[54] The National Lawyers Guild is an independent Organization of American professional lawyers founded in 1937 with the aim of "maintaining civil rights and liberties." The National Lawyers Guild, An Inventory of Records 1936-1976, An Index to Periodicals 1937-1979, Merklejohn Institute Inventory No. 2 (1980). It is also "concerned with developments in the fields of international law and relations focusing primarily on the policies of the United States Government." Foreword, Report of the National Lawyers Guild (1977 Middle East Delegation).

[55] Ibid.

General Legal Requirements Under Military Occupation

Israeli settlements policy in the occupied territories is completely against the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War[56] and the Hague Convention on the Laws and Customs of War on Land.[57] Article 47 of Geneva Convention IV provides that:

> Protected persons who are in occupied territory shall not be deprived in any case or any manner whatsoever of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, or by any agreement concluded between the authorities of the occupied territories and the occupying power, and nor by any annexation by the latter of the whole or part of the occupied territory.

Fundamental changes introduced in the West Bank and Gaza by the Israeli government have undoubtedly deprived Palestinian Arabs the benefits of Geneva Convention IV. Demolition of Arab houses and expropriation of their land in order to give room for Jewish settlements have been undertaken in defiance of the Convention and the well established rule of international law: _ex injuria jus non oritur_.[58]

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[56] See note 1 supra.
[57] See note 3 supra.
[58] See Dinstein, note 128, Chapter III.

Article 49 of Geneva Convention IV is concerned with the question of transfer of civilian population and states that:

> Individual or mass forcible transfers as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive . . . The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

The construction of Jewish settlements in the West Bank and Gaza has been on the increase steadily. According to the Report of the Security Council Commission established under Resolution 446 (1979):[59]

> Between 1967 and May, 1979, Israel has established altogether 133 settlements in the occupied territories, consisting of 79 in the West Bank, 29 in the Golan Heights, 7 in the Gaza Strip and 18 in the Sinai . . . . As a whole, therefore, leaving aside the Sinai area, where settlements have been vacated, Israel has established 33 new settlements since the adoption of the Security Council of its Resolution 446 (1979) . . . bringing the total number to 148. In addition, a number of existing settlements have been expanded, sometimes to more than twice their original size.[60]

The number of settlers has also increased:

> Since the Government [Likud] came to power in 1977, the number of settlers in the West Bank alone has risen from 3,200 to 17,400. Those figures do not include the settlers in East Jerusalem and the Jerusalem area, which by now number approximately 80,000.[61]

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[59] U.N.Y.B. 385 (1979).

[60] Report of the Security Council Commission, Doc. S/14268 of 25 November 1980 at 31; also U.N.Y.B. 387-388 (1979).

[61] Ibid.

There can be no doubt that the West Bank and Gaza now under Israeli occupation represents a Palestinian state-in-embryo as envisaged by the U.N. Partition Plan and by no means a no-man's land up for grabs. Thus the Israeli government continues to violate provisions of Article 55 of the Hague Regulations Respecting the Laws and Customs of War on Land. It is provided under this Article that:

> The Occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.[62]

According to the Report of the Security Council Commission:

> The extent of the land confiscated in the West Bank had increased from 27 per cent in September 1980. No precise figure has been given for additional confiscation of land in the Golan Heights. However, on the basis that only 5 Arab villages have been left and that only 8,000 inhabitants have been able to remain out of the original population, it seems fair to conclude that the occupying authorities control virtually all the land.
>
> Similarly in the Gaza Strip, according to witnesses, confiscation of land is final; however, no reliable figures have been made available to show the extent of the land confiscated so far.[63]

Israel as a military occupant is entitled to administer lands in the occupied territories and to derive current revenues from their accustomed use, but is not entitled to appropriate such lands on a permanent basis for new uses of its own choosing as it has done. In support of this legal position, it has been argued that:

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[62] Hague Regulations, see note 3 supra.
[63] Report of the Security Council, not 60 supra at 32.

> The occupying state shall regard itself only as administrator and usufructuary of such public buildings, immovable property, forests and agricultural undertakings belonging to the hostile state. It must protect the capital of these properties and administer them according to the rules of usufruct. The usufructuary principle forbids wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation, contrary to the rules of good husbandry.[64]

It has further been argued that:

> Appropriation of public immovables is not lawful so long as the territory on which they are found has not become state property of the occupant through annexation. During mere military occupation of enemy territory, a belligerent may not sell, or otherwise alienate, public enemy land and buildings, but may only appropriate their produce.[65]

The Israeli government rejects the application of the Fourth Geneva Convention, and in particular Article 49 referring to occupied territories. The main argument given by Israel for rejection of the Geneva Convention is that, prior to the 1967 war, Jordan and Egypt were not the legitimate sovereigns of the West Bank and Gaza Strip, respectively.[66] However, the argument side-steps the real issue of belligerent occupation in which it does not really matter whether Jordan or Egypt were legitimate sovereigns, which indeed they were not. The United Nations, through both the General Assembly and the Security Council, have unequivocally held that the Geneva Convention IV is applicable in the West Bank and Gaza.[67] In 1980, the Security Council unanimously adopted Resolution 465[68] "*affirming once more* that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem." In view of this position, it is appropriate to conclude that Israel's policies and practices in establishing settlements in the occupied territories since 1967 have no legal validity. Whether they have involved public or private property, these measures are at best a denial of justice to those affected, and at worst constitute a serious obstruction to the achievement of a comprehensive, just and lasting peace between the parties concerned.

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[64] Stone, op.cit., note 9 at 714.

[65] Oppenheim, op.cit. 397.

[66] Statement made by Israeli Foreign Minister Moshe Dayan before the General Assembly on 10 October 1977, see note 13 supra.

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[67] See G.A. Res. 32/91A (1977) (131 in favour, 1 against, 1 abstention), *U.N.Y.B. 323* (1977); S.C. Res. 446 (1979) see note 59 supra. Also, S.M. Boyd, "The Applicability of International Law to the Occupied Territories," *1 Israel Yearbook of Human Rights 259* (1971).

[68] *U.N.Y.B. 409* (1980).

The Status of Jerusalem

Historical Background

Jerusalem has changed hands more than 25 times for the past 3,500 years. Beginning with about 1,000 B.C., King David captured the old Jabusite Town and claimed it as the City of David.[69] Later it was conquered by one empire after another--Babylonian, Persian, Macedonian, Ptolemy, Selucid and Roman. In 638 A.D., the Caliph Omar captured Jerusalem for Islam. Later it was held by Seljuk Turks, by Christian Crusaders, and by Egyptian Mameluks. From 1517 to 1917, Jerusalem was ruled by Ottoman Turks. It was later administered by Great Britain following the end of World War I, and on July 22, 1922, she was confirmed as the Mandatory Power by the Council of the League of Nations.[70] When the Palestine Mandate terminated on May 15, 1948, the Jews on one side and Arab armies from other countries supported by Palestinian Arabs fought hard for possession of Jerusalem, and Palestine as well. The war ended with the city occupied by both Israel and Jordan, each with conflicting claims over possession.[71] Under the U.N. Plan of Partition with Economic Union which was recommended by the General Assembly in 1947, Jerusalem would have formed a corpus separatum under an international regime, but this plan was never fully implemented.[72]

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[69] Much of this discussion derives from a Report of the Commission Appointed by His Majesty's Government to Determine the Rights and Claims in Connection with the Western or Wailing Wall at Jerusalem: December 1930, (1931), Great Britain. Distributed as *U.N. Docs. A/7057/Add.1* and *S/8427/Add.1*, Feb. 23, 1968.

[70] See Section IIIa, Chapter II.

[71] P. de Azcarate, *Mission in Palestine 1948-1952*, 182 (1966).

Access to the Holy Places

Jerusalem is a place of religious significance. It has been revered by Jews for more than 3,000 years, by Christians for nearly 2,000 years, and by Moslems for more than 1,300 years.[73] However, owing to the diversity of religious interests, Jerusalem's "eternity" has constantly been faced with bloodshed since Israel was established in 1948. The international regime character of the city as envisaged by the Plan of Partition failed to take off in the face of both political and military realities. Even a modified U.N. draft statute for the city compatible with the fait accompli of the occupation of Jerusalem by Israel and Jordan "was pigeon-holed without even being accorded the honour of a debate" as a result of the pressure of various delegations at the U.N. Some delegations, sympathetic with the Vatican's point of view, "were not prepared to accept anything less than integral and complete internalization."[74] From 1948 to 1967, when Israel occupied the whole of Jerusalem, the U.N. had not resolved, like the whole Arab-Israeli conflict, the permanent legal status of the city.

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[72] G.A. Res. 181(II) U.N.Y.B. 247 (1947-48).

[73] S. Shepard Jones, "The Status of Jerusalem: Some National and International Aspects," 33 Law & Contemporary Problems 176 (1968).

[74] Azcarate, op.cit. 184.

Israel's occupation of East Jerusalem in June of 1967, along with the West Bank territory held by Jordan since 1948, brought serious repercussions for the status of the city. With West Jerusalem already declared by Israel as its capital, the government immediately extended its jurisdiction to the newly occupied parts of the city through legislative measures.[75] These measures were rejected by the U.N. General Assembly in Resolutions 2253(ES-V) of July 4, 1967,[76] and 2254(ES-V) of July 14, 1967.[77] Israel was also censured by the Security Council which called for the rescinding of measures taken which affected the status of Jerusalem. S.C. Resolution 242 (1967) emphasized the inadmissibility of acquisition of territory by force and called for the withdrawal of the Israeli forces from territories occupied during the June 1967 conflict. In addition, the Security Council passed a number of specific resolutions directed to the status of Jerusalem. Resolutions 252 (1968) of 21 May 1968,[78] 267

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[75] The Law and Administration Ordinance (Amendment No. 11) Law, 5727 (1967), and The Municipalities Ordinance (Amendment No. 6) Law, 5727.

[76] U.N.Y.B. 221 (1967).

[77] Ibid. 223.

[78] Ibid. 264 (1968).

(1969) of 3 July 1969,[79] 271 (1969) of 15 September 1969,[80] and 298 (1971) of 25 September 1971,[81] all of them confirmed the United Nations' intent to maintain Jerusalem as a corpus separatum.

Legislations and actions of Israel over Jerusalem have therefore not been accepted by the majority of the international community. Like other occupied territories the status of Jerusalem can finally be resolved in the context of a general international settlement which would need to take into account the legitimate claims of both the Arabs and the Israelis. For Jerusalem a lasting settlement is only possible if, it has been argued:

> The parties most concerned would not overemphasize the importance of political images of Jerusalem formed centuries ago in a very different age. Historic national dreams, perhaps vital in ages past, may need updating if the fundamental interests of the peoples of our time are to be advanced.[82]

Indeed, a rational settlement calls for a negotiated solution under an arrangement probably to be determined by the U.N. Security Council.

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[79] Ibid. 220.
[80] Ibid. 221.
[81] Ibid. 187 (1971).
[82] Jones, op.cit. note 73 at 180.

Section II
Israel Incursion into Lebanon

Article 2(4) of the U.N. Charter reaffirms recourse to aggressive war as illegal. Only under Article 51 can force be applied in self-defence against an armed attack, and even then only provisionally until the Security Council considers the situation. When Israel invaded Lebanon in June, 1982, it was expected that it would live up to the provisions of the U.N. Charter and the laws of war governing belligerent parties in armed conflict. Israel's conduct of hostilities inside Lebanon between June and September of 1982 is analysed in light of the U.N. Charter and the relevant laws of war.

Israel's Justification for the War

After the Israeli army attacked south Lebanon, the Israeli government justified it as an exercise of its legitimate self-defence because Lebanon was unwilling to stop the P.L.O. from attacking Israel.[83] Although international law makes it illegal for the territory of a sovereign state to be used to launch attacks against another state,[84] and the latter is justified to retaliate by force by way of self-defence;[85] nevertheless, certain legal requirements have to be met as a justification for resort to force. It was established in the celebrated Caroline Case[86] that in order for a state to have recourse to self-defence it has "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation." In addition, the state has to show that it "did nothing unreasonable or excessive since the act, justified by the necessity of self-defence must be limited by that necessity."[87]

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[83] Israeli Permanent Representative at the United Nations, Provisional Verbatim Record of the 2,375th Security Council Meeting, S/PV.2375, June 6, 1982, at 8-33.

[84] G. Schwarzenberger, "Beirut 1982: An Interdisciplinary Test Case," 38 Y.B.W.A. 295 at 298 (1984).

So far, published reports on the invasion[88] do not indicate that at the time of Israel's invasion in Lebanon the situation in the region was so alarming as to require excessive force to bring it under control. The Final Report of the Commission of Enquiry into the Events at the Refugee Camps in Beirut dwells much of its findings on the excessive force used by Lebanese Phalangists planning to remove Palestinians from Lebanon, although evidence of Israel's initial attack in the so-called "Peace for

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[85] Article 51 of the U.N. Charter.

[86] See R.Y. Jennings, "The Caroline and Macleod Case," 32 A.J.I.L. 82 (1938).

[87] Ibid. 89.

[88] Commission of Enquiry into the Events at the Refugee Camps in Beirut, Final Report (Kahan Report) 22 I.L.M. 473 (1983); International Commission to Inquire into Reported Violations of International Law by Israel, Israel in Lebanon (McBride Report), Ithaca Press (London) 1983.

Galilee" on June 6, 1982, fell short of showing any imminent danger on Israel from Lebanon.[89] During the Security Council debate on the Lebanon situation, the Israeli ambassador to the U.N. related the measures taken by Israel to the P.L.O.'s "constant terrorist provocations since July 1981," which included "150 acts of terrorism instigated by the P.L.O., originating in Lebanon, against Israelis and Jews in Israel and elsewhere: in Athens, Vienna, Paris and London."[90] In this list of alleged P.L.O. activities, there was no reference to the P.L.O. launching hostile acts from Lebanese territory on to the territory of Israel as no such activity had in fact taken place during the period.[91] What became obvious was that Israel had the intention of forcing the P.L.O. out of Lebanon[92] and to obtain negotiation and co-existence from the Arab population in the occupied territories.[93]

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[89] Kahan Report, *ibid.* 477.

[90] See note 19 supra at 1.

[91] McBride Report, *op.cit.* 190.

[92] Israel's Permanent Representative to the U.N. on 8 June 1982 demanded that "proper arrangements be made so that Lebanon should no longer serve as a staging ground for terrorist attacks . . . . We are entitled to demand that concrete arrangements be made that would permanently and reliably preclude hostile actions against Israel's citizens from Lebanese soil." See note 83 supra.

[93] The Israeli Minister of Defence is quoted to have referred to this as another aim of the war: "The bigger the blow and the more we damange the P.L.O. infrastructure, the more the Arabs in 'Judea and Samaria' and Gaza will be ready to negotiate with us and establish co-existence." *The Times* (London) 5 August 1982.

International Law and the Israel Incursion

The reasons given by Israel as justification for Lebanese invasion do not appear to be proportional to the large-scale raids carried out first by Israeli Defence Forces in Beirut and afterwards by the Lebanese Phalangists with the aid and approval of the Israeli army inside Lebanon. The extent of the damage was too widespread to be classified as self-defence.[94] It was rejected bythe Security Council in Resolution 508[95] which called for cessation of hostilities and in the following Resolution 509[96] the Security Council demanded withdrawal of Israeli forces from Lebanon.

Under the U.N. Charter provisions and classical international law, Israel had a burden of showing the necessity of invading Lebanon as to have been "instant overwhelming, leaving no choice of means and no moment for deliberation"[97] except to strike Lebanon. This burden was never discharged by Israel. Relevant in this case are also three major U.N. Resolutions declaratory of non-intervention in international law. Resolution 2131 XX [98] condemned direct or indirect intervention for any reason whatsoever in the external or internal affairs of any state, armed intervention and all other forms of interference or attempted threats against the personality of the state. The Resolution also made an important reference to the need for all states to respect the right to self-determination of peoples. Self-determination has now become an international legal right[99] and wars of national liberation enjoy special legitimacy as a result of endorsement by the United Nations. It therefore follows that Israel has a duty to recognize and respect Palestinian self-determination in as much as the latter has to respect Israel's territorial integrity.[100]

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[94] Detailed account of the Israel incursion into Lebanon is contained in the McBride Report, op.cit.

[95] U.N.Y.B. 450 (1982).

[96] Ibid.

[97] See Jennings, "The Caroline and Macleod Cases," note 89 supra.

[98] Declaration on Inadmissibility of Intervention in Domestic Affairs of States and Protection of their Independence and Sovereignty adopted by 109 votes to 0 with 1 abstention, U.N.Y.B. 94 (1965).

In the Declaration on Friendly Relations and Cooperation Among States,[101] the General Assembly reiterated the Charter provisions concerning the threat or use of force and provided specific examples of obligations of states including respect for existing international boundaries and the duty to refrain from the threat or use of force to violate international lines of demarcation. Since Declarations are rarely issued by the United Nations, the office of Legal Affairs, in pronouncing its legal status, maintains that:

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[99] See Section I(c), Chapter I supra.

[100] On the duty for the P.L.O. to respect the territorial integrity of the state of Israel, see notes 16 and 17, Chapter III supra.

[101] G.A. Res. 2625(XXV) U.N.Y.B. 788 (1970).

> A Declaration is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated (to be) resorted to only in rare cases relating to matters of major and lasting importance where maximum compliance is expected.[102]

Reference to the right of self-determination in the Declaration in question was more clear-cut, with a specific reference to the duty of every state to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter,[103] and to render assistance to the United Nations in carrying out Charter responsibilities regarding the implementation of the principle.

The right to render assistance to those peoples combating alien domination was stipulated clearly in the Declaration on the Definition of Aggression adopted in 1974.[104] The Declaration is binding in spite of the reservation under Article 7, since reservation is "a unilateral statement, however phrased or named,"[105] and a doctrine ha developed distinguishing between "reservations" and "declarations," the first expressing the decision not to apply a prescribed treaty provision and the second confirming the readiness to implement the treaty, although in a manner possibly deviating from the treaty pattern. It has been stated that a statement designated as "reservation" or "reservation and understanding" may be regarded as nothing more than a clarifying statement or declaration short of a reservation, if it does not, in fact, constitute a qualification of the substantive terms of the treaty, declaration or agreement.[106]

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[102] U.N. Doc. E/CN.4/L.610 of 2 April 1962.

[103] Articles 1 and 55 of the Charter.

[104] U.N.Y.B. 847 (1974).

[105] the Vienna Convention on the Law of Treaties, Art. 2(d), 8 I.L.M. 679 (1969).

Since the Israeli government referred to Lebanese toleration of P.L.O. activities as justifying invasion, it is important to examine the provisions of Article 7 of the Declaration. This excludes from the enumerated acts of aggression the struggle of peoples forcibly deprived of the right to self-determination referred to in the Friendly Relations Declaration. The rights of these peoples

> . . . particularly peoples under colonial and racist regimes or other forms of alien domination to struggle for self-determination and to seek and receive support, in accordance with the principles of the Charter and in conformity with the Declaration on Friendly Relations is specifically protected.

It has been argued that Israel was entirely within its right when it chose to attack Palestinian positions inside Lebanon,[107] but we should not lose sight of the fact that, at this time of Israeli attack, both the P.L.O. and Israel were observing a ceasefire which had endured for almost a year.[108] There was no immediate provocation from the P.L.O. to justify the attack and therefore Israel's argument of self-defence _a fortiori_ becomes weak.

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[106] M. Whiteman, 14 Digest of International Law 186 (1970).

The Laws of War in Relation to the Israeli-Lebanese Conflict

Military Necessity

The evidence from published reports regarding Israel incursion into Lebanon leaves no doubt that a state of war existed between them and it does not matter, from the legal standpoint, whether Lebanon considered so, for in practice war exists when the facts of war exist.[109] Since the laws of war are in their essence independent of the formal status of the parties to the struggle, the fact that Lebanon did not consider itself as a victim of war with

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[107] Y. Dinstein, "Legal Aspects of the Israeli Incursion into Lebanon and the Middle East Conflict," _6 Middle East Focus No. 4_, at 5 (1983-84).

[108] See McBride and Kahan Reports, note 88 supra.

[109] L.C. Green, "The Nature of the 'War' in Korea," _4 Int'l Law Quarterly 468_ (1951).

Israel is immaterial[110] for the purpose of legal analysis of the war.

One of the international law guidelines in conducting military actions is to aim at military objects and other paraphernalia used in combat hostilities, e.g. armed combatants, military vehicles, weapons, fuel, munitions depots and fortified positions. Much of the military actions on these objects is justified by the principle of military necessity. The Geneva Convention IV, 1949, prohibits destruction of property "except where such destruction is rendered absolutely necessary by military operations."[111] Also, Protocol 1 Additional to Geneva Conventions, 1977,[112] provides that:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[113]

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[110] P.C. Jessup, "Should International Law Recognize an Intermediate Status between Peace and War?" 48 A.J.I.L. 98 (1954); B. Chen, The International Law of Recognition 356 (1951).

[111] Relative to the Protection of Civilian Persons in Time of War, signed 12 August 1949, Article 53, see note 1 supra.

[112] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 16 I.L.M. 1391 (1977).

[113] Ibid., Article 52(2).

Israel is not a party to this protocol but since it supplements the 1949 Conventions it together with these other instruments is declaratory of customary law in spite of the evidence showing that they were not strictly observed by her. It was reported that there was massive bombardment of refugee camps whose inhabitants were largely civilians,[114] destruction of hospitals, schools, religious and charitable institutions, bombardment of urban areas, commercial and industrial premises.[115] Diplomatic premises which otherwise are sacrosanct were also bombarded and whether this happened accidentally or intentionally, it is very difficult to see how the damage done could be attributed to military necessity.[116]

Civilian Objects

Civilian objects in times of war are protected by law. The Hague Convention IV makes illegal the destruction of property "unless imperatively demanded by the necessities of war."[117] Bombardment of towns, villages, dwellings or buildings is prohibited under Article 25 while Article 27 makes necessary to spare "buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places the sick and wounded are collected, provided they are not being used at the time for military purposes." There is no proof that many of the buildings of the nature provided under Article 27 which were destroyed in Beirut were being used by Lebanon for military purposes against Israel. The same buildings and premises are protected under Geneva Convention IV[118], the Hague Convention on Cultural Property[119] which bans "any act of hostility directed against such property."[120] and Protocol 1 Additional to the Geneva Conventions.[121] Included also under Protocol 1 is protection for medical units generally[122] and medical vehicles,[123] while Article 52 elaborates on the limit of attack to military objects not to extend to civilian objects. Israel, although not a party to Protocol 1, is bound by the Geneva and Hague Conventions.

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[114] McBride Report, op.cit. 31.

[115] Ibid. 32-33.

[116] The embassies destroyed or damaged include those of France, the U.S.S.R., China, Kuwait, Turkey, Iran, Algeria, Iraq, Morocco, Bahrain, South Yemen, Yugoslavia, German Democratic Republic and Canada, ibid. 34.

[117] Article 23(g), note 3 supra.

Provisions of these Conventions testify the great importance which international law attaches to the protection of civilian objects as long as they are not used for military purposes. While incidental damage to civilian objects may occur in the course of fighting the actions of the Israeli Defence Forces in Lebanon went beyond military targets and, as a result, civilian objects were seriously attacked.

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[118] Article 18 and 19 on civilian hospitals. ibid.

[119] 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. 215.

[120] Article 4(1), ibid.

[121] See note 112 supra.

[122] Article 12 and 13, ibid.

[123] Article 21, ibid.

Civilian Population

Part II of Geneva Convention IV makes provisions for general protection of the population against certain consequences of war. Article 13 covers "the whole of the populations of the countries in conflict" and special protection is extended to the wounded and sick[124] and persons working in civilian hospitals.[125] By Article 27:

> Protected persons are entitled in all circumstances to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

However, Article 28 claims that "the presence of a protected person may not be used to render certain points or areas immune from military operations."

In spite of these provisions, there is overwhelming evidence that Israel's invasion resulted in a very large number of civilian casualties. The exact figure of the dead will never be known, but it is estimated that for three months between June and September, 1982, more than 20,000 civilians lost their lives.[126] The alarming death toll was caused by bombardment directed against Palestinian centres of population with the aim of "annihilating P.L.O. terrorists"[127] and "destruction of the terrorists infrastructure."[128] It is not disputed that some civilian centres had guerrilla fighters, but the large civilian character of the population as provided under Article 50(3) of Protocol 1 Additional to Geneva Conventions is a serious injunction although not a deterrent against indiscriminate attack. The article provides that "the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character." Owing to the difficulties of identifying real military objects, it was therefore illegal for Israel to carry out extensive attack in very large areas with civilian concentrations, and more so because such bombardment was not preceded by any military engagement or the launching of any attack by the P.L.O. combatants.

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[124] Article 16, note 1 supra.
[125] Article 20, ibid.

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[126] McBride Report, op.cit. 53.

[127] Mr. Yitzhak Shamir, Israeli Foreign Minister, IDF Radio, 8 June 1982, cited by McBride Report, ibid. 56.

[128] Mr. Arien Sharon, Israeli Defence Minister, on Israeli Television, 14 June 1982, cited by McBride Report, ibid.

Proportionality

The proportionality principle requires that in responding to coercion, the measures must be proportional to the amount, type or character of the threat which is claimed to justify self-defence. Under Article 22 of the Hague Convention IV, "the right of belligerents to adopt means of injuring the enemy is not unlimited," and "it is especially forbidden--to employ arms, projectiles or material calculated to cause unnecessary suffering."[129] This basic principle was reaffirmed in Article 35 of Protocol 1 Additional to the Geneva Conventions[130] and applied in the context of civilian protection in Article 51(5)(b).[131] Under Article 57(2)(a) and (b), it is also obligatory to consider the principle of proportionality in planning or deciding an attack.[132]

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[129] See note 3 supra.

[130] Article 35: (1) "In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited; and (2) It is prohibited to employ weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

[131] Article 51(5)(b): "Among others, the following types of attacks are to be considered as indiscriminate ... (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

The Israeli Defence Forces have been accused of using excessive force during the Lebanese attack in spite of these well elaborated laws which are declaratory of customary law. It would therefore appear that the advantage gained by Israel through the use of excessive force was not proportional to the original prophecied claim of self-defence. Indeed, it has been observed that:

> Coercion that is grossly in excess in cases of what, in a particular context, may be reasonably required for conservation of values against a particular attack, or that is obviously irrelevant or unrelated to this purpose, itself constitutes an unlawful initiation of violent change.[133]

This is the fundamental character of the principle of proportionality which Israel violated.

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[132] Article 57(2)(a) and (b): "(2) With respect to attacks, the following precaution shall be taken: (a) those who plan or decide upon an attack shall . . . (iii) refrain from deciding to launch any attack which may be expected tocause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) an attack shall be cancelled or suspended dif it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

[133] McDougal & Feliciano, Law and Minimum World Public Order 241-44 (1961).

The Sabra and Shatila Massacre

The horrific massacre of hundreds of civilian people in the Sabra and Shatila camps marked the end of a three-month Israeli siege in Lebanon. These camps are two of the twelve camps established in Lebanon by the United Nations Relief and Works Agency (UNRWA) to give shelter to Palestinians who were rendered homeless as a result of the creation of the state of Israel. During the war the camps were repeatedly bombed and shelled by the Israeli army between June and the middle of August 1982. A state of calm had been restored in the camps after Palestinian forces were evacuated from Lebanon at the beginning of September, following the ceasefire agreement between Israel and the P.L.O.[134] However, tension increased greatly in Lebanon with the assassination of Lebanon's President-elect Bashir Gamayel on September 14. The next day units of Israeli Defence Forces moved into west of Beirut[135] and on September 17, hundreds of Palestinians were massacred in the refugee camps by Lebanese Christian militias with the apparent acquiescence of the Israeli government.[136] Although there was no direct evidence of Israel participation in the massacres, the return to west Beirut of the Israeli army at the beginning of September violated the ceasefire agreement of August 12 which had generally been held in the Beirut area for the rest of the month.[137] Israel's action was considered to have execerbated the security situation in Lebanon especially after elements of Israeli Defence Forces clashed with local armed groups resulting in heavy artillery gunfire in Beirut.[138] The U.N. Security Council condemned Israel's violation of the ceasefire agreement[139] and the Palestinian massacres were also condemned by the Security Council.[140]

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[134] The agreement was negotiated by U.S. Ambassador Phillip Habib and both parties had agreed to respect it. There was no formal signing of the agreement.

[135] McBride Report, op.cit. 165.

[136] Ibid. 167, 177, 178; Kahan Report, op.cit. 491.

In summary, Israel committed war of aggression against Lebanon[141] and the Palestinian people during the "Peace for Galilee" war[142] contrary to the U.N. Charter and other fundamental principles of international law.[143] She also breached the international obligation to safeguard the

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[137] Report of the U.N. Secretary-General on the Situation in the Beirut Area to the Security Council, 2 September 1982, 21 I.L.M. 1178 (1982).

[138] Report of the U.N. Secretary-General on the Situation in the Beirut Area to the Security Council, 17 September 1982, 21 I.L.M. 1180 (1982).

[139] S.C. Resolution 520, 17 September 1982, 21 I.L.M. 1168 (1982).

[140] S.C. Resoltuion 521, 19 September 1982, 21 I.L.M. 1169 (1982).

[141] See notes 108-110 supra.

[142] Kahan Report, op.cit. 477.

[143] See notes 111-113, 117-125 supra.

Palestinian peoples' right of self-determinism. The Palestinians are a people with legitimate rights as were hinted in the Camp David Agreements[144] but confirmed in the United Nations before Camp David.[145]

By persistenly refusing to accept and carry out decisions of the Security Council in Resolution 508 of June 5, 1982,[146] calling upon ceasefire on the Lebanese-Israel border, Resolution 509 of June 6, 1982,[147] demanding that Israel withdraw all its military forces forthwith and unconditionally to the internationally recognized boundaries of Lebanon, Resolution 513 of July 4, 1982,[148] calling upon all the parties to the conflict to respect the rights of the civilian populations in accordance with the Geneva Conventions, and Resolution 515 [149] demanding the Israeli government to lift immediately the blockade of the city of Beirut. Israel violated the U.N. Charter principle.[150]

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[144] See notes 170 and 171, Chapter III.

[145] G.a. Resolution 3236(XXIX), U.N.Y.B. 226 (1974).

[146] See note 95 supra.

[147] Ibid.

[148] U.N.Y.B. 452 (1982).

[149] 21 I.L.M. 920 (1982).

[150] Articled 25 of the Charter provides that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Israel was also guilty of dispersing, deportation and ill-treatment of many Palestinians during and after the Lebanese incursion in breach of the 1949 Geneva Conventions and Additional Protocol 1, 1977. The Israeli military commanders who were in charge of directing Lebanese Phalangists' attacks in the Camps and took no trouble to see whether orders were being followed or did nothing to bring the massacres to and end were individually guilty of negligence and liable for prosecution.[151] Strictly speaking, the government of Israel had no valid reasons under international law for invading Lebanon and for the manner in which it conducted the war inside the country.

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[151] See generally L.C. Green, "War Crimes, Extradition and Command Responsibility," 14 I.Y.H.R. 17 at 39-53 (1984).

CHAPTER V

THE P.L.O.'s WAR OF NATIONAL LIBERATION AND THE LEGAL DUTY OF ISRAEL IN THE CONFLICT

Section I: War of National Liberation as a Legal Option

Recent Developments in International Law

Elsewhere in this work it has been observed that self-determination has already acquired the lineaments of *lex lata*.[1] What is particularly important here is the operational implications of self-determination as they are explicated in the U.N. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[2] In so far as declarations can, under certain conditions, create obligations on states,[3] the Friendly Relations Declaration was an ambitious restatement of contemporary international law in light of the U.N.

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[1] See section 1(c), Chapter I.

[2] G.A. Resolution 2625(XXV), 24 October 1970, hereinafter the Friendly Relations Declaration, *U.N.Y.B. 789* (1970).

[3] See generally Wroclaw, *Custom in Present International Law* (1964).

Charter. It urges, in part pertinent to the foregoing, that:

> Every state has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

Peoples engaged in resisting the suppression of their right of self-determination are fighting what has come to be known as a war of national liberation. It has simply been defined as:

> . . . a prolonged, extra-legal, armed, popular-based struggle waged by a nation which perceives itself to be distinct from the state or states which dominate the nation and its territory; the campaign is conducted against the extant structure of the state or states in which the nation is incorporated or upon whose territory it lays claim.[4]

Wars of national liberation are theoretically civil wars; but, due to the component of external support, these wars have legally become international conflicts. According to Protocol 1 Additional to the 1949 Geneva Conventions, international armed conflicts:

> . . . include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the

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[4] R.J. Tyner, "Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or for Territories?" 5 Yale Studies in World Public Order 245 (1978-79).

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> United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[5]

The Protocol which has already received 73 ratifications[6] supplements the Geneva Conventions of August 12, 1949, and is considered in detail in section (b) infra.

In view of this legal development and of the explicit language of the serial resolutions of the General Assembly since 1969,[7] the Palestine Liberation Army (P.L.A.) should be viewed as the military arm of a Palestinian people under P.L.O. leadership, engaged in a war of national liberation. The first preambular paragraph of General Assembly Resolution 2535B(XXIV)[8] recognized that:

> The problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights.

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[5] Article 1(4), Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Final Act, adopted June 8, 1977, reprinted in 16 I.L.M. 1391 (1977) entered into force December 7, 1978.

[6] As of February 8, 1988, I.C.R.C. Bulletin No. 147, April 1988.

[7] In 1969, the General Assembly shifted its perspective to acknowledge the Palestinians as a people having rights under the U.N. Charter. Until then, the Palestinian problem was taken to be that of refugees claiming for the right of return to their homeland.

[8] By a vote of 48 to 22 with 47 abstentions, December 10, 1969, U.N.Y.B. 241.

The first operative paragraph provides recognition by the United Nations of the plight of the displaced and Palestinian refugees by reaffirming "the alienable rights of the people of Palestine" to return to their homeland.

Palestinian rights have been reaffirmed consistently in all subsequent resolutions of the General Assembly which deal with the subject.[9] While it is understood that the resolutions of the General Assembly are merely recommendations with no legal consequences attached to them, it is nevertheless conceded that both the General Assembly and the Security Council in most cases make political recommendations and decisions within the law of the Charter provided that the Security Council does not exceed its powers and is prepared to enforce by political means the decisions it has reached. The rationale behind this approach is mainly to adopt resolutions and decisions aimed at a settlement[10] which is one of the goals of the United Nations, i.e. peaceful settlement of disputes "in conformity with the principles of justice and international law."[11] Therefore, the General Assembly, but more so the

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[9] Res. 2672C(XXV) of 8 December 1970, U.N.Y.B. 282 (1970); Res. 3089D(XXVIII) of 7 December 1973, U.N.Y.B. 247 (1973); Res. 3210(XXIX) of 14 October 1974, U.N.Y.B. 226 (1974); Res. 3236(XXIX) of 22 November 1974, U.N.Y.B. 226 (1974); Res. 3237(XXIX) of 22 November 1974, U.N.Y.B. 227 (1974).

[10] R. Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council," 64 A.J.I.L. 17 (1970).

[11] Article 1(1) of the U.N. Charter.

Security Council, "have added significance in matters of peace and security because the body of principles is still so fragmentary and abstract."[12] Moreover, such Security Council's political approach precedents "contribute to the specificity which is essential to convert the 'soft' law of the Charter into the 'hard' law needed for effective implementation" of U.N. decisions.[13]

Against this background, the U.N. Friendly Relations Declaration establishes the following coordinate international rights and obligations as between the P.L.O. and its military wing the Palestine Liberation Army (P.L.A.) on one side and Israel on the other:

1. The P.L.O. is entitled to fight against Israel;
2. The P.L.O. is entitled to call upon third states for support in the struggle;
3. Third states are obligated to provide such help to the P.L.O. in the resistance; and
4. Israel is not entitled to characterize the support that third states are obliged to--and do, in fact--render to the P.L.O. as a violation of international law or in any way a violation of its own rights.

These legal aspects which flow directly from the P.L.O./Israel conflict have not been adequately expressed in the resolutions of the General Assembly. The lawfulness of third-party support for the P.L.O. has the effect of prohibiting Israel from seeking to penalize the fulfilment of the international obligation of the right of self-determination for Palestinian people. It would therefore appear that the theory of wars of national liberation eschews the traditional one-sided support for the government in power in the event of armed conflict in which, so long as the war is for national liberation, either side is entitled to third-party support. By the same token, it seems that wars of national liberation have departed from the contemporary jus ad bellum outlawing war in any form.

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[12] O. Schachter, "The Quasi-Judicial Role of the Security Council and the General Assembly," 58 A.J.I.L. 964 (1964).

[13] Ibid.

At least in three instances--the Friendly Relations Declaration,[14] Declaration on the Definition of Aggression,[15] and the Hostages Convention[16]--the United Nations has conceded wars of national liberation to be a legitimate concern for people fighting for the right to self-determination who would not be deterred by any action or occurrence otherwise illegal. The Hostages Convention in particular makes by way of exception the application of this Convention in situations of hostage-taking by national liberation movements. Article 12 in particular provides that:

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[14] See note 2 supra.

[15] U.N.Y.B. 847 (1974).

[16] Adopted by the U.N. General Assembly by Resolution 34/146 of 17 December 1979 and opened for signature 18 December 1979, 74 A.J.I.L. 277 (1980).

> In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under these Conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in Article 1, paragraph 4, of Additional Protocol 1 of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

This article was adopted to express a sincere desire for the legitimacy of the struggle for self-determination, but was by no means a carte blanche for ordinary criminals and terrorists of fortune who might commit attacks which have nothing to do with furtherance of liberation struggle for the people under oppression.

While in principle the use of force in international relations continues to be outlawed, as a practical matter non-use of force indiscriminately without regard to other basic principles such as colonialism, alien and racist regimes which continue to violate principles of the U.N. Charter and other international laws is no longer acceptable. Thus, wars of national liberation are brought up in a way to counter-balance the blanket cover against use of force in international relations[17] since alien regimes sustain their hegemonies by applying force against the oppressed. The incompatibility of wars of national liberation with the fundamentals of the U.N. Charter is what many states have recently accepted. In this regard decolonization of some countries would have been elusive without the threat or use of force. This objective reality is supported by both the United Nations practice[18] and legal scholars.[19] Professor Reisman, in particular, argues that:

> Insistence on non-violence and deference to all established institutions in a global system with many injustices can be tantamount to confirmation and reinforcement of those injustices. In certain circumstances, violence may be the last appeal or the first expressed demand of a group or unorganized stratum for some human dignity.[20]

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[17] S. Schwebel, "Wars of Liberation as Fought in U.N. Organs," in Moore (ed.), Law and Civil War in the Modern World 455-6 (1974).

[18] When Portugal called upon the Security Council to take action against what it called "aggression" by India in December, 1961, in the Goa incident, India accused Portugal of illegal occupation of Goa and the Security Council resolution intended at censuring India failed because one of the negative votes was cast by a permanent member of the Security Council (7 in favour, 4 against - U.S.S.R., Sri Lanka, U.A.R., Liberia) and the U.N. accepted the *fait accompli*. U.N.Y.B. 131 (1961). Similar efforts to label n.l.ms as terrorists never derailed M.P.L.A. in Angola, FRELIMO in Mozambique, PAIGC in Guinea Bissau and Cape Verde Islands, and PATRIOTIC FRONT in Zimbabwe from ultimately achieving their right to self-determination.

[19] Schwebel, *loc.cit.*; M. Reisman, "Private Armies in a Global System: Prologue to Decision," in Moore, *op.cit.* 252.

[20] Reisman, *ibid.* 259.

Indeed, the P.L.O.'s decision to wage war of national liberation came in response to a long-time injustice for loss of a homeland. Like in many rebellions which have risen during situations of hardship,[21] war of national liberation for the P.L.O. is a reaction to a long-standing unjust situation of refugeehood and statelessness. Up until now, wars of national liberation have not sought to supplant the nation-state, but only to seize control of it. The question which puts the P.L.O. in a peculiar situation is the quest, at least in theory, to destroy the state of Israel and establish a Palestinian state.[22] It has already been argued that this plan is inconsistent with international law,[23] but this does not altogether put the legitimate demands of the P.L.O. on the back burner. What is particularly important is to find a fair and lasting solution to demands of both sides, thereby limiting the recurrence of struggles from each side.

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[21] See generally T. Gurr, Why Men Rebel (1970).
[22] See section 1(b), Chapter III.
[23] Ibid.

The 1977 Protocol 1 Additional to the Geneva Conventions

Protocol 1 Additional to the Geneva Conventions[24] strengthens the 1949 Conventions[25] by elevating wars of national liberation under certain conditions to international armed conflicts.[26] It has transferred into humanitarian law struggles for self-determination by national liberation movements and strengthened protection of civilian and military wounded, sick and shipwrecked, military and civilian medical personnel, and military and civilian medical units;[27] extending protection to medical aircraft;[28] obliging the parties to a conflict to cooperate in the search for missing persons and to respect the remains of the deceased;[29] imposing stronger rules on relief operations on behalf of the civilian population;[30] and extending minimal fundamental guarantees to all persons affected by an armed conflict.[31]

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[24] See note 5 supra.

[25] 1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (1950);

2. Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 (1950);

3. Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (1950); and

4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (1950).

[26] See generally L.C. Green, "The New Law of Armed Conflict," Essays on the Modern Laws of War (1985).

[27] Articles 8-10.

[28] Articles 24-31.

[29] Articles 32-34.

Armed forces as defined under Article 43(1) have to be under the control of a responsible command. This definition conforms to that found under Article 1 of the Hague Regulations appended to the Hague Convention IV of 1907 and extended to Article 4A(2) of the Geneva (Prisoners of War) Convention, 1949. Article 1 of the 1907 Regulations provides that:

> The laws, rights and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions:
> 1. They must be commanded by a person responsible for his subordinates;
> 2. They must have a fixed distinctive sign recognizable at a distance;
> 3. They must carry arms openly; and
> 4. They must conduct their operations in accordance with the laws and customs of war.

Protection of civilian population and objects under Protocol 1 gets emphasis in Article 51(4) and (4) and in Article 53, while Article 48 reiterates the need to distinguish between civilian objects and military objectives and urges parties to the conflict to direct their operations only against military objectives. This provision follows codification of the basic principle of international humanitarian law under Article 35(1), that the right of parties to a conflict to choose the methods and means of warfare is not unlimited.

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[30] Articles 68-71.
[31] Article 75.

Although the Protocol deals with specific types of armed conflict and is not concerned with the legal status of national liberation movements as such, it does, however, place the governments and national liberation movements in the same position, should they become parties to an international armed conflict, to assume the same rights and obligations under the Geneva Conventions and Protocol 1. For example, under Article 96(3), both sides must spare the lives of the wounded, care for prisoners and refrain from attacking civilians, and both sides must likewise respect all the other rules of humanitarian law.

One crucial notion appearing under Article 44(3) is for war of national liberation to go underground in exceptional circumstances. The Article provides that:

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of hostilities, an armed combatant cannot distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

The legislative history of this Article[32] makes it clear that the intention of the lawmakers was to allow combatants to invoke the new rule in certain situations such as in an occupied territory or a war of national liberation in which, owing to the overwhelming superiority of the occupation forces or oppressive regimes in power, guerrillas have to employ underground combat. Be that as it may, Article 44(3) is restrained by paragraph (4) under which a combatant who does not comply with the requirements of distinction forfeits his right to be considered a prisoner of war if captured. Moreover, if such a combatant kills, injures or captures anybody while in civilian disguise, he is guilty of perfidy because the feigning of a combatant as a civilian would give him non-combatant status which is an example of a prohibited, perfidious act.[33] In addition, any conceivable act of inspiring terror among civilians is specifically prohibited by the Geneva Conventions and Protocol. In particular, Article 51(2) of Protocol 1 provides that:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the preliminary purpose of which is to spread terror among the civilian population are prohibited.

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[32] See commentary to Article 44, para. 1698, Y. Sandoz et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 529 (1987).

[33] Article 37.

Also under this Protocol, launching indiscriminate attack on civilian population or civilian objects by national liberation movements in the knowledge that such attack will cause excessive loss of life or damage to civilian objects is a grave breach.[34]

In the case of the P.L.O., unless Israel becomes a party to the Protocol for purposes of reciprocity, the Protocol is unenforceable against her. Even if Israel were to become a party to the Protocol, the new rules put P.L.O. fighters under a strict legal regime in which, in order to benefit from them, they will have to demonstrate a high degree of discipline and commitment to adhere to the laws of war. The Protocol, and particularly the special provisions on wars of national liberation, are an inducement for a movement like the P.L.O. to submit to the accepted standards of humanitarian law for the benefit of civilian population.

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[34] Article 85(2)(b) of Protocol 1.

Section II
The Status of P.L.O. Combatants

Customary Law and the Status of Combatants

An Overview

Until the medieval era, the role of the army was to conduct military actions in "public and open" war and all other actions outside this confinement were regarded as brigandage and looting.[35] The rationale behind openness in war was an antithesis of perfidy and assassinations which were repugnant to the honour of chivalry and membership of knightly orders to which many of the fighters belonged. Combatants therefore went to war to prove their acts of courage and prowess rather than to kill.

When Christian Empires broke down, the idea of knights and princely honours was replaced by armed forces serving territorial, secular states. In this era, like Christendom, war measures were exclusively reserved for soldiers, the idea being to limit killings only to soldiers.[36] The civilian population had the legal immunity from attack so long as they did not participate in combat. Those who did were treated as marauders and liable for execution when caught. Indeed, at least since the time of the early international jurists, Ayila (1582), Grotius

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[35] G. Draper, "The Status of Combatants and the Question of Guerrilla Warfare," XLV B.Y.I.L. 174 (1971).

[36] Ibid. 177.

(1625), Gentili (1620) and Pufendorf (1688), there had existed a consensus of legal expectation that armed "brigands" were to be considered as pirates, and both as the "common enemy of all."[37]

The early nineteenth century witnessed civilians participating in armed combat when their countries were being invaded or a military occupant was being expelled. The period of Napoleonic wars in Europe witnessed a Spanish campaign against Napoleonic armies with new terminologies such as guerrilla meaning "little war" being used to refer to civilian tactics employed by Spanish guerrillas to defeat Napoleon in the 1800s.[38] These groups of irregulars, loosely organized and acting normally without authorization were effective in conducting clandestine and sporadic offensive operations against the enemy occupant, often taking advantage of their knowledge of the fighting terrain, their capacity to move and choose their military positions clandestinely, and their capacity to disappear when pursued. They could easily obtain shelter, treatment and sustenance from their own kin and friends in the area. Due to these advantages:

> The military harm that they could inflict, based on the element of surprise inherent in their

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[37] Cowles, "Universality of Jurisdiction Over War Crimes," 33 Cal. L. Rev. 177 at 188 (1945); See also Article 82 of the Lieber Code, note 44 infra.

[38] J. Paust, "Law in a Guerrilla Conflict: Myths, Norms and Human Rights," 3 I.Y.H.R. 47 (1973).

> clandestine method of fighting, and their ability to melt away into the countryside and towns with impunity, made them very formidable opponents. The elements of surprise, and their capacity to gain intelligence of enemy movements, vital to military effectiveness, tended to make up for their disadvantage in terms of logistic supply, deficient weaponry and lack of firepower.[39]

However, when captured, the guerrillas' fate was either summary execution or severe maltreatment because, like in the Christendom and medieval eras, the law of war extended no protection to them.

Since the successful Spanish guerrilla warfare, strong forces of national patriotism engulfed many people under external domination and motivated them to take an active part in guerrilla warfare to emancipate themselves.[40] Modern technology in communications systems, armaments such as time bombs and underground organizations in large population centres all have since enhanced the effectiveness of guerrilla war, but it is very much in contradiction with the humanitarian development of the laws of war.

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[39] Draper, op.cit. 178; See also G. Schwarzenberger, "Terrorists, Guerrilleras and Mercenaries," Univ. of Tole. L. Rep. 72 (1971).

[40] Baxter, op.cit. 335; Draper, ibid.; Trinianin, "Questions of Guerilla Warfare in the Law of War," 40 A.J.I.L. 534 (1946).

Customary Law

The wave of wars fought in the early part of the nineteenth century necessitated the codification of universal laws of war, an exercise hitherto not yet undertaken by collective states. The driving force were the nationalist feelings engendered by foreign invasions making wars no longer a domestic matter since fighting was carried across national borders. Over time, strong humanitarian sentiments developed, prompting the formation of a movement in 1863 to codify the customary law of war on land. The publication of Francis Lieber's work, Instructions for the Government of the Armies of the United States in the Field, was the first major code to be referred to by other countries,[41] although there were codes of military discipline promulgated by Richard II in 1383, Henry V in 1415, Swiss Sempacherbriff in 1393, and a number of similar codes in sixteenth century France.[42] The Lieber Code, as it was commonly known, had set forth articles on military necessity and the need to distinguish between armed enemies, combatants or men in arms and non-combatants.[43]

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[41] D. Schindler & J. Toman, The Laws of Armed Conflicts 3 (1973).

[42] See L.C. Green, Essays on the Modern Law of War 31 (1985).

[43] Articles 15-23, 37, 44, 68, 71, 155, Schindler & Toman, op.cit.

So far as the law of war on land is concerned, the Lieber Code, referring to guerrilla fighting, reflected the traditional prevailing view of the law at that time, namely, that guerrilla warfare was a violation of the law of war.[44] This view was held in the 1899 Hague Convention concerning the Laws and Customs of War on Land[45] which made a distinction between combatants and non-combatants with the aim of assuring more protection to non-combatants in the event of an armed attack.[46] It was revised in the Hague Convention IV of 1907 with Articles 1 and 2 of the Regulations appended to the Convention applying not only to armies but also to guerrilla bands. For the first time, fighters operating outside the organized armed forces of a belligerent state were accorded lawful combatant status.

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[44] Article 82 of Lieber Code provided that: "Men or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."

[45] Hague Convention II, J. Scott, The Hague Conventions and Declaration of 1899 and 1907, 107 (1915).

[46] Article 3 of the Regulations Annex to the 1899 Hague Convention provided that "The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy both have a right to be treated as prisoners of war."

Existing Law of Combatancy

Under Hague Convention IV and the Geneva Conventions[47] to be treated as privileged combatants persons must be members of regular armed forces or, in the case of irregular armed forces, they must meet certain conditions as already cited.[48]

The Geneva Conventions II and III also extend the scope of those entitled to be treated as privileged belligerents in four respects:

1. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power are entitled to a treatment as privileged belligerents.[49]
2. In addition to traditional militias and volunteer corps, organized resistance movements belonging to a Party to the conflict and operating in or outside their own territory, are expressly included among privileged belligerents.[50]

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[47] Geneva Convention II and III, note 25 supra.

[48] Article 1 of the 1907 Hague Regulations and Article 4A(2) of Geneva Convention III.

[49] Article 16 of Geneva Convention II and Article 5 of Geneva Convention III, note 25 supra.

[50] Article 13(3) of Geneva Convention II and Article 4(3) of Geneva Convention III, ibid.

3. Until the status of any person possibly falling under a competent tribunal is determined, the benefit of doubt operates in favour of the prisoner.[51]
4. Persons entitled to privileged belligerent status and prosecuted as war criminals under the law of the Detaining Power for acts committed prior to capture retain, even if convicted, the benefits of Geneva Convention III of 1949 on Prisoners of War.[52]

The P.L.O. can only benefit from the Geneva Conventions if Protocol 1 applies to the conflict thereby bringing the Conventions into operation subject to common Article 3 in the four Conventions.

The Status of P.L.O. Combatants

To the extent that the P.L.O. combatants can conduct their war of national liberation, according to customary law of war,[53] they would be entitled to privileged combatancy. Their operations will therefore conform to the conditions outlined in Article 4A(2) of Geneva Convention III and which the P.L.O. already possess, as are analysed below.

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[51] Article 16 of Geneva Convention II and Article 5 of Geneva Convention III, ibid.; See also Baxter, "The Privy Council and the Qualification of Belligerents," 63 A.J.I.L. 290 (1969).

[52] Article 85 of Geneva Convention III.

[53] See note 48 supra.

Organized Body. P.L.O. combatants operate under superior military command of the Palestine Liberation Army (P.L.A.), P.L.O.'s military wing, and therefore if captured are entitled to prisoner of war status. However, this does not include irregular fighters operating on their own who, upon capture and proof of hostile action, are liable to trial as war criminals or as offenders against the internal security law of Israel, or under occupation penal law if caught in occupied territories.[54]

Belonging to a party to the conflict. P.L.O. combatants belong to an Organization which is the sole representative of the Palestinian people in the Arab-Israeli conflict, in spite of its public denunciation by Israel. The P.L.O. is a resistance movement and therefore a party to the conflict whose combatants, when captured, are legally entitled to privileged combatancy, so long as they conform to all other conditions under Article 4A(2) of Convention III.

Commanded by a person responsible for his subordinates. What this provision means is responsibility to some higher authority under which the commander must have sufficient authority to ensure that the conditions applicable to members of the group necessary for lawful combatancy are observed. The Palestine Liberation Army has commanders responsible for the internal disciplinary regime of the combatants with authority from the P.L.O. If these commanders depart from discharge of their obligations, they definitely place combatants at risk in the event of their capture by Israel.

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[54] The Penal Law of an Occupying Power must be established within the limits of Article 64 of the Geneva (Civilians) Convention, 1949, see note 25 supra.

Having a distinctive sign recognizable at a distance. This is admittedly a very severe condition in practical and operation terms and one not generally observed by the P.L.O., particularly in occupied territories. However, it is such an essential condition for protection of combatants that they ignore it at their own peril when captured. In Military Prosecutor vs. Swarka et al.,[55] this condition was put to test. The case involved two defendants who had infiltrated in the occupied territory from Egypt and launched rockets onto a civilian settlement injuring several people. When captured and brought to trial, the defendants pleaded entitlement to prisoner of war status under Geneva Convention III, arguing that they were regular soldiers in the Egyptian army and committed the attack under order of their commander. It was contended by the prosecution that even if proved that the defendants were regular soldiers carrying out superior orders, they would not be entitled to the protection of the Geneva Convention as prisoners of war because they wore civilian clothes at the time that they had carried out their operations. The court held that the defendants were to be prosecuted as saboteurs, citing Mohamed Ali v. Public Prosecutor[56] in which soldiers of the Indonesian Army were deprived of the status of prisoner of war because they were captured in civilian clothing while engaged in sabotage activities in Singapore. From the two judgements, it seems all but clear that wearing a distinctive sign recognizable at a distance alone may not be enough to exonerate a soldier from wrongdoing so long as the criminal intent of his motive is proved.

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[55] 7 I.Y.H.R. 264 (1977).

Carrying arms openly. This condition is essentially related to the condition of identifiability of a combatant. P.L.O. combatants, like any other resistance movement, are not known to observe this condition strictly since they carry some weapons such as hand grenades and explosives in concealment and produce them only for attack. The court in Military Prosecutor v. Omar Mohmud Kassem &

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[56] [1968] 3 ALL E.R. 488.

Others[57] accepted the following description of the P.F.L.P. practice:

> The Members of the Organization sometimes wear military uniform and openly carry arms outside inhabited areas and sometimes they do not wear uniform in the course of action and do not carry arms openly for fear of being caught.

For the P.L.O., the military disadvantage of this method of warfare, like in other breaches, is to forego protection of the Geneva Convention III.

It has been argued that practical difficulties in implementing these conditions have generally tended to make some of them rather hypothetical.[58] Indeed, in view of the practical difficulties of wars of national liberation, the Geneva Conventions and even the 1977 Protocol 1 have not yet brought P.L.O.combatants to strict adherence of these laws.

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[57] File No. 4/69, Law and Courts in the Israeli Held Areas, published by the Institute for Legislative Research and Comparative Law of the Hebrew University of Jerusalem, 25 (1970), cited by Theodor Meron, "Some Legal Aspects of Arab Terrorists Claims to Privileged Combatancy," S. Shoham (ed.), Of Law and Man 243 (1971).

[58] Schwarzenberger, op.cit. 80.

Section III: The Legal Analysis of Terrorism in Light of the P.L.O. Struggle

A comparative legal analysis of terrorism and wars of national liberation has been made in Chapter I with a conclusion that, a far as terrorism is concerned, there is not yet a universal definition of what amounts to terrorism.[59] What appears to be agreed so far is that certain violent activities not circumscribed to war-time if committed by an individual, a group of people or a government with the purpose of creating terror may amount to what is termed terrorism.[60] Terrorist activities include assault, assassination, arson, and of recent import has been the practice of psychological terror by such methods as kidnapping.[61] Also in war-time, the practice of armies in combat using silencers on weapons for night sniping, using night barrages of fire or intermittent firing for such purposes, calling out to enemy encampments at night, using loudspeakers at night to threaten or play upon enemy superstitions such as fear of death, using booby traps or any material or weapon for such purposes and uses of massive firepower against enemy combatants and civilians alike create psychological terror and mayhem.[62] In spite of this categorization of terrorist activities, there is still widespread disagreement within the world community regarding the nature of the threat presented and the failure to agree upon remedial action.[63]

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[59] See Section IV, Chapter I.

[60] Schwarzenberger, op.cit. 72.

[61] E.g. since 1985 there have been several kidnappings of foreign nationals in Lebanon creating an atmosphere of fear. Newsweek at 32, February 29, 1988.

With respect to the nature of terrorism, a number of commentators have come up with various theories, some saying that terrorism is an item for export[64] while others maintain that, like revolution, terrorism is part of state terror,[65] and some go so far as to regard terrorism as a tool of the oppressed.[66] Either way, the diversity of theories shows how terrorism may be applied as a weapon for a variety of motives. Whether the native may be right in the eyes of the public by whomsoever employs terror to champion a cause, it is inconclusively debatable.

In the medieval era, terrorism was extensively used as a religious weapon by Muslim fanatics to spread fear in the form of violence and the murder of Christians and other religious enemies.[67] The Napoleonic wars in the Spanish Peninsula during the nineteenth century[68] and the centralization of governments during the formative period of the nation states at the expense of competing institutions such as the Church also generated individual attacks and assassination of monarchies as a form of protest. Tyrannicide was a practice universally accepted and approved by the late sixteenth century.[69] However, after the Vienna Congress in the mid-nineteenth century, western European governments modified their position to grant asylum to offenders of political crimes, some of whom had employed terror to further their political agenda.[70]

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[62] This was used by Muslim Phalangists and Israel during the 1982 incursion in Lebanon. See Section II Chapter IV.

[63] See e.g. notes 76 and 89 infra.

[64] Y. Dinstein, "Terrorism and Wars of Liberation as Applied to the Arab-Israeli Conflict: An Israeli Perspective," 3 I.Y.H.R. 86 (1973).

[65] R.A. Friedlander, "The Origins of International Terrorism: A Micro-Legal-Historical Perspective," 6 I.Y.H.R. 50 (1976).

[66] A.W. Rovine, "The Contemporary International Legal Attack on Terrorism," 3 I.Y.H.R. 10 (1973).

Since the end of World War I, transnational terror has in most cases been linked with nationalist movements. It was the creation of a Greater Serbia by the Treaty of St. Germain under the name of Yugoslavia[71] which aroused irredentism in Hungary leading to the assassination of a Yugoslavian King in 1934.[72] In Great Britain, the creation of the Irish Republican Army triggered off the Anglo-Irish war from January 1919 until May 1921, leading to Irish independence.[73]

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[67] Friedlander, op.cit. 51.

[68] See note 38 supra.

[69] Friedlander, op.cit. 53.

[70] M.C. Bassiouni, International Extradition and World Public Order 370-75 (1974).

[71] Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes (Protection of Minorities) signed at St. Germain-en-Laye, September 10, 1919. Hudson, 1 International Legislation 321 (1919-1921).

[72] Kuhn, "The Complaint of Yugoslavia Against Hungary with Reference to the Assassination of King Alexander," 29 A.J.I.L. 87 (1936).

Significant outbreak of terrorist activity and state repression in the Middle East began as far back as 1922 after the first major Arab riot against Jewish emigration to Palestine. It was repeated on a bigger scale in 1936. Jewish terror fostered by the Irgun and Stern gangs against the Germans and British after the Second World War engendered British counter-terror.[74] After founding the state of Israel, *fedayeen* attacks against Jewish targets inevitably followed.[75] However, neither Israel nor the P.L.O. could concede that these violent activities were purely terrorism because of the self-determination cachet. Likewise, present-day Palestinian "terrorism" is no more terrorist than Israeli raids and invasions, exactly illustrating the admonition by the U.N. Secretariat in 1972, that: "As violence breeds violence, so terrorism begets counter-terrorism, which in turn leads to more terrorism in an ever-increasing spiral."[76] but without properly addressing the root cause of "terrorism." Therefore, while it may be agreed, for example, that Israel's invasion of Egypt in 1956, partially in response to provocation by fedayeen,[77] and the Beirut Raid of 1968[78] were legal from the point of view of state responsibility for the consequences of that support, what of the Israeli raids in Lebanon in 1978[79] and 1982[80] in which it has been revealed that the rules of proportionality were demonstrably violated by the nature and extent of incursions?[81] The retaliatory response undertaken by the Israeli military forces was vengeful and retributive resulting in large numbers of civilian casualties. Since reprisals, as opposed to acts of war, include military incursions and are limited and proportional to a hostile act[82] when they result in full-scale war disregarding even the minimum standards of the laws of war, the result becomes a phenomenon of terrorism. As a result all parties in dispute are likely to retaliate endlessly by whatever means at their disposal to challenge any impeding threat to their security. In the instant case, the Israeli army has therefore become no less terrorist than P.L.O. guerrillas. Perhaps this is why the United Nations in spite of denouncing interference in the internal affairs of states with respect to their political independence and sovereignty, exculpates national liberation movements from condemnation in their use of force.[83] What the majority of member states in the United Nations contend in more objective terms is to remove misery and despair first and then terrorism, if that be the right term, will disappear.[84] Such claim seems merely to affirm that an otherwise legitimate use of force for self-determination should not itself be considered as an impermissible terrorist process per se.[85] In theory therefore a state harbouring guerrillas acts illegally; but in practice a war of national liberation is enough to transform activities of a national liberation movement into permissible transnational violence.[86]

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[73] Hachey, "Political Terrorism: The British Experience," in Alexander (ed.), *International Terrorism: National, Regional and Global Perspectives* 107-10 (1976).

[74] Tyner, *op.cit.* 249.

[75] Sobel, "Conflict of Rights," in Sobel (ed.), *Palestinian Impasse: Arab Guerrillas and International Terror* 6-7 (1977).

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[76] "Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those Forms of Terrorism and Acts of Violence which Lie in Misery, Frustration, Grievance and Despair, and which Cause Some People to Sacrifice Human Lives, Including Their Own in an Attempt to Effect Radical Changes." U.N. Secretariat, U.N. Doc. A/C.6/418 at 9.

[77] Henkin, How Nations Behave: Law and Foreign Policy 196-199 (1968).

[78] See particularly Falk, "The Beirut Raid and the International Law of Retaliation," 63 A.J.I.L. 415 (1969) and Blum, "The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk," 64 ibid. 73 (1970).

[79] Friedlander, "Retaliation as an Anti-terrorist Weapon: The Israeli-Lebanon Incursion and International Law," 8 I.Y.H.R. 75 (1978).

[80] See Section II, Chapter IV.

[81] Ibid.

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[82] Dinstein, "A Survey of Self-defence in International Law," in Bassiouni & Nanda (eds.), 1 A Treatise on International Criminal Law 278-279 (1973).

[83] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Resolution 2131(XX), U.N.Y.B. 94 (1965); See also Annex to the Declaration on Definition of Aggression, G.A. Res. 3314(XXIX) U.N.Y.B. 847 (1974).

Power politics and ideological militancy have made impossible a common agreeable formula to curb terrorism, let alone agreeing to a universal definition. Even in areas where there has been a common agreement like the

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[84] Thus, during the General Assembly debate in 1972 it was widely argued that "The legitimacy of the use of force to advance the cause of liberation was thus no longer disputable, and the mere use of force by freedom fighters could not be condemned, because it was a consequence of misery and despair. In their case, punishment should be accompanied by measures of redress." Measures to Prevent International Terrorism, note 76 supra, Official Records of the General Assembly 27th Session, Sixth Committee, Legal Questions, 20 September - 12 December 1972. U.N. Doc. A/C.6/SR.1366.

[85] See Section I supra. Contrary to this view the U.N. Secretary General's Report stated that "The subject of international terrorism has nothing to do with the question of when the use of force is legitimate. See note 76 supra at 7.

[86] Reisman, "Private Armies in a Global War System: Prologue to Decision," note 19 supra at 256-260. He adds that a private army is unlawful in current international practice only so long as it is not winning, at 258. See also Brownlie, "International Law and the Activities of Armed Bands," 7 Int'l & Comp. L.Q. 712 (1958).

Aircraft Conventions,[87] many states rejected mandatory sanctions[88] and did not feel obliged to punish or conduct trials against hijackers qua "terrorists,"[89] in spite of the universal jurisdiction theme apparent in trio Conventions. Therefore, "terrorism" thrives and it is left to an individual aggrieved party such as Israel to take effective remedial action in the form of reprisals from the P.L.O.; although, either way, it has long been held that "there can be no self-defense against self-defense."[90] *A fortiori*, reprisals--like other modes of coercion--will, from the political point of view, loose their significance when the community of nations, probably the U.N., become capable of replacing them with appropriate action such as granting the right to self-determination to the dispossessed. Until such time, Article 2(4) of the U.N. Charter providing against the use of force in international relations will not have resolved the dilemma.

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[87] (i) Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature at Tokyo, September 14, 1963, *2 I.L.M. 1042* (1963); (ii) Convention for the suppression of Unlawful Seizure of Aircraft, done at the Hague, December 16, 1970, *10 I.L.M. 133* (1971); (iii) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, *10 I.L.M. 1151* (1971).

[88] Rovine, *op.cit.* 23.

[89] See particularly Articles 6 and 7 of the Montreal and Hague Conventions, respectively, note 87 supra.

[90] *14 Trials of War Criminals Before the Nuremberg Military Tribunals (N.M.T.) 329* (1949).

There must be a limit to permissible suffering, no matter what the cause or type of participants. The P.L.O. has been waging war of liberation against Israel, while the latter treats the P.L.O. and its armed wing (the P.L.A.) as a terrorist organization, but at the same time side-stepping the real issue of Palestinian self-determination and defiance of the P.L.O.'s recognition as a genuine national liberation movement representing the Palestinian people.[91] Is it enough for Israel and the U.S.A. to refuse to listen to the P.L.O.'s demands while at the same time complaining of terror? Terror by whom? Take the on-going riots in the occupied territories which are not "terrorist"-instigated. These are oppressed people rising against an occupying terrorist army. Instead of moving to negotiate for peace, Israel is using terror to deny others what itself so long struggled to achieve--the right to self-determination. It does not serve any useful purpose for Israel, supported by the U.S.A., to denounce the P.L.O. as a terrorist organization and, in turn, to claim that Palestinians have no clear leadership with which to negotiate. Palestinians have the right to produce their own leadership--the P.L.O.--and when allegations are made that it is a terrorist organization, such allegations are no more than denying the existence of Palestinians as a people[92] entitled to self-determination as it was once alleged.[93]

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[91] See the P.L.O.'s invitation to the U.N. and participation in debates on Palestinian self-determination. G.A. Res. 3236(XXIX), U.N.Y.B. 226 (1974); G.A. Res. 3375, U.N.Y.B. 247 (1975).

In so far as international terrorism is concerned, many states seem to share the view that the world community must reach an agreement which prohibits terroristic acts that are contrary to the U.N. Charter and to other goal values shared by the international community, such as aircraft hijackings. However, some states still seem to draw a distinction between terrorism for private gain which is universally abhorred and terrorism practised in a legitimate struggle for self-determination.[94] As such the legal meaning of terrorism is only qualified and by no means absolute.

The United States' Attempt to Expel P.L.O. from the U.N. Headquarters

In 1987, the United States Congress enacted a law to expel the P.L.O. from the United States on the ground that it was a terrorist organization acting in a manner prejudicial to the security of the state.[95] As a result of this law, the P.L.O. Information Office in Washington was subsequently closed down[96] and the government moved to have the P.L.O. expelled from the United Nations where it was invited by the General Assembly to participate in U.N. deliberations on the Palestinian question.[97] This invitation was not a novel procedure in United Nations practice. As early as 1947, the General Assembly, in its Resolution 104 (S-1),[98] had invited the Jewish Agency for Palestine to participate in the discussions on the future government of Palestine. The Agency participated in the First Special Session (Spring, 1947), the Second Regular Session (Autumn, 1947), and the Second Special Session (Spring, 1978) of the General Assembly when the question of the future government of Palestine was under discussion before termination of the Mandate for Palestine and the establishment of Israel on May 15, 1948.[99]

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[92] See Section IV infra.

[93] Mrs. Golda Meir, Israeli Prime Minister, in 1969 told the Sunday Times that "There is no such thing as Palestinians . . . . It was not as though there was a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them. They did not exist. The Sunday Times, (London) 15 June 1969.

[94] Rovine, op.cit. 32.

Legally, the P.L.O. is not a member of the United Nations, for such membership is only open to states fulfilling conditions under Article 4 of the Charter.

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[95] The Times (London), 12 March 1988 at 5.

[96] Ibid.

[97] See G.A. Resolution 3236(XXIX), note 91 supra.

[98] Adopted 5 May 1947, Djonovich, United Nations Resolutions 192 (1972).

[99] S. Rosenne, "Recognition of Israel by the Security Council in 1948," 13 I.Y.H.R. 295 at 296 (1983).

P.L.O. status in the United Nations is that of an observer with no right to vote.[100] Under the Agreement between the United Nations and the United States regarding the headquarters of the United Nations in the City of New York,[101] it was agreed that the U.N. headquarters shall be inviolable[102] and that the United States government shall not impose any impediments to persons invited to the headquarters district by the United Nations or by such specialized agency on official business,[103] irrespective of the existing relations between the governments of the persons referred to above and the U.S. government.[104]

Under Article IV, section 13(f) of the Agreement, it is only the United Nations which has the exclusive right to authorize or prohibit entry of persons into the headquarters district and to prescribe the conditions under which persons may remain or reside there. The United Nations protested against the U.S. attempt to close the P.L.O. mission at the U.N. headquarters and asked the International Court of Justice for an advisory opinion.

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[100] See Report of the U.N. Secretary General on "Question of Invitation to Certain Regional Organizations Invited to Attend Previous Session of the Council (ECOSOC)," U.N. Doc. E/2028, 20 June 1951 at 3.

[101] Signed at Lake Success on 26 June 1947, II U.N.T.S. 11 (1947).

[102] Article III, Section 9.

[103] Article IV, Section 11(b).

[104] Article IV, Section 12.

The Court found the U.S. action contrary to Agreement and called for settlement in accord with the Agreement.

The 1947 Agreement provides a dispute settlement mechanism under which the dispute shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary General, one by the Secretary of State of the United States, and the third to be chosen by the two or, if they should fail to agree upon a third, then by the President of the International Court of Justice.[105] The U.N. General Assembly has since voted overwhelmingly in favour of the P.L.O. mission to remain open at the U.N. headquarters,[106] and the United States court has ruled against expulsion of the P.L.O. from the U.N. headquarters.[107]

The United States' attempt to expel the P.L.O. from the U.N. is to try to weaken its formidable challenge to Israel hegemony in the Arab-Israeli conflict by simply seeking to keep it out of touch with the United Nations. Unfortunately, keeping the P.L.O. outside the United Nations may not be a solution to the Arab-Israeli conflict.

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[105] Article VIII, section 21(a).

[106] By a vote of 148 to 2 (Israel & U.S.A.) the U.N. General Assembly condemned a U.S. attempt to close the P.L.O. mission at the United Nations, The Globe and Mail (Toronto) 24 March 1988 at A10.

[107] New York Times (New York) 30 June 1988.

and at best it would deepen and exercerbate the dispute rather than resolve it.

Section IV: The P.L.O. and the Right to Self-Determination

It has already been observed elsewhere in this work that self-determination is now lex lata.[108] This section only attempts to relate the P.L.O.'s struggle to that legal right in spite of the legal controversy over who are the people entitled to the right of self-determination. Article 1(1) common to both Human Rights Covenants[109] proclaims that:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The criteria for peoplehood is the ability to determine own self and therefore, once peoplehood is distinctly identified, it is entitled freely to determine its future course. This can be determined by existence of an ethnic group linked commonly by history. It is suggested that the link must express itself, inter alia, in a common territory, religion or language,[110] although historical evidence shows that an ethnic group may lose its territory, split up into various factions, and speak in many different tongues.[111] However, what is very important, even in the case of dispersion of a group, is to uphold the will to live together and to continue common traditions.[112]

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[108] See Section I, Chapter I.

[109] 6 I.L.M. 360-385 (1967).

[110] Y. Dinstein, "Collective Human Rights of Peoples and Minorities," 25 Int'l & Comp. L.Q. 104 (1978).

The Palestinians were recognized as a people entitled to national rights by the United Nations in the Palestine Partition Resolution of 1947.[113] The test applied was a link between the people and the territory where they could continue exercising their right to self-determination. Since 1969, the U.N. General Assembly has repeatedly reaffirmed "the inalienable rights of the people of Palestine"[114] to be exercised within the de jure boundaries of the Palestinian state yet to be determined and outside the de jure boundaries of the state of Israel as ultimately determined. The significance of U.N.

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[111] E.g. the Ngoni tribe of Tanzania were in origin close relatives of Zulus of South Africa. Their leaders formed one of several groups which moved away from Natal to avoid forcible incorporation in the Empire of Shaka (Zulu Chief). The Matabele of Zimbabwe and the Shangaans of Mozambique were of the same general dispersion. The Ngoni moved faster and further than the others arriving in Tanzania by 1840. They still live, as do the Matabele and Shangaans, as distinct tribal groups with their independent culture. R. Oliver & G. Mathew, 1 History of East Africa 208 (1963).

[112] M.C. Bassiouni, "'Self-Determination' and the Palestinians," 65 Proceedings of A.S.I.L. 32 (1971).

[113] G.A. Resolution 181(II), Part 1A(3) and passim, U.N.Y.B. 247 (1948).

[114] G.A. Res. 2535B(XXV); G.A. Res. 2672C(XXV); G.A. Res. 3210(XXIX); G.A. Res. 3236(XXIX); G.A. Res. 3237(XXIX).

resolutions is that there is a continuing urge for the establishment of two states in what was Palestine in 1947.[115] Israel is therefore under a legal obligation to facilitate the realization of Palestinian right to self-determination. This obligation is owed from the fact that Palestinian rights have to be exercised in a territory under Israeli occupation and the boundaries of which are at present indeterminate.

Section V
The Legal Duty of Israel in the Conflict

The state of Israel was proclaimed on May 15, 1948 and subsequently admitted to the United Nations, although its permanent borders were and are still indeterminate. The events which followed the establishment of this state have already been discussed in the previous chapters and need not be repeated. Having also discussed the legal position of Palestinian right to self-determination, a brief analysis of Israel's duty toward achieving that right is explored in this section.

Much of the controversy surrounding the Arab-Israeli conflict has so far centered on the Palestinian right to self-determination as much as the right of Israel to exist as a state. It is indisputable that the latter has been achieved and widely acknowledged, but very much at the expense of the Palestinian right to self-determination which is as elusive to date as it has always been since 1947.

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[115] See Section 1(d), Chapter III.

In 1948, the U.N. General Assembly adopted a resolution[116] which, inter alia, called for repatriation of refugees to their homes, but Israel refused to allow their return to the frontiers of the partition resolution.[117]

On territorial question, in 1967, Israel annexed Jerusalem and refused its internationalization as was recommended earlier by the U.N. General Assembly[118] and continued to refuse withdrawal from Arab territories occupied in 1967, except for the Sinai Peninsula which was returned to Egypt following the 1979 Peace Treaty. Security Council Resolution 242 of 1967,[119] which called upon Israel to withdraw from occupied territories is now publicly denounced as not applicable to the situation in the occupied territories[120] in spite of the insistence by the United Nations that the same Resolution must form the basis for peace negotiations.

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[116] G.A. Resolution 194(III) of 11 December 1948, Djonovich, op.cit. 85.

[117] Report of the U.N. Mediator, Count Bernadotte, U.N. Doc. A/648, 16 September 1948, U.N.Y.B. 304 (1948).

[118] See Reports of the Conciliation Commission for Palestine in U.N. Documents A/927, 21 June 1949 and A/1367/Rev. 1, 2 September 1950.

[119] U.N.Y.B. 257 (1967).

[120] See e.g. Israeli Prime Minister's rejection of the United States' peace plan for Middle East based on S.C. Resolution 242 and calling for an international conference and withdrawal of Israel from occupied territories. The Prime Minister called the plan "bad," "unwelcome" and "impractical." Newsweek, 21 March 1988 at 39.

Establishment of civilian Jewish settlements in the occupied territories by Israel has been perennially condemned to be against the 1949 Geneva (Civilian) Convention and the United Nations continue to disapprove any measure taken by Israel to transform and ultimately annex the occupied territories.[121]

The Camp David Agreements which resulted in the 1979 Peace Treaty between Europe and Israel did not in any way foreclose solution to the Palestinian question as latest moves by Israel would seem to suggest.[122] On the contrary, the Egyptian-Israeli Peace Treaty was but a single step toward resolving the Middle East conflict in its entirety.[123]

Israel's intransigence to recognize the P.L.O. as a legitimate representative of the Palestinian people and its continued opposition to participation of this Organization in peace negotiations is contrary to the United Nations overwhelming support for the Organization as the sole representative of the Palestinian people. Moreover it clearly shows Israel's distaste for making peace with the

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[121] See Section I, Chapter IV.

[122] See the reaction by Israeli Prime Minister on the U.S. proposed international conference to resolve the Palestinian Conflict, note 120 supra.

[123] See Section III, Chapter III.

Palestinians. Her aim is merely to secure Arab recognition and to consolidate its territorial gains. This is why Israel would prefer to deal for and seek settlement of the Palestinian question with Arab states and by-pass the Palestinians. However, what seems to be clear at the present is that no peace in the Middle East is likely to be achieved through divide and rule or, rather, by the application of force. Neither can _quieta non movere_ silence people's legitimate right to self-determination as it has been suggested.[124] The U.N. practice, at least in the areas of colonialism, alien occupation and racist regimes, shows that it is not prepared to accept the _fait accompli_ of indelible injustices done in the past to protect the _status quo_ because such practice is contradictory to the Charter principles for which the U.N. stands.[125] Therefore, while Israel has a right to exist as a state, it also has a corresponding duty to relinquish the occupied territories according to U.N. Resolution 242 of 1967. It is through international pressure and coercion in the absence of voluntary compliance by Israel that must be brought for her to bear in order to achieve Palestinian rights. This seems to be the only avenue left open so far which may ultimately end the deadlock.

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[124] L.C. Green, "Self-Determination and the Settlement of the Arab-Israeli Conflict," _65 Proceedings of A.S.I.L. 47_ (1971).

[125] See generally Sections I and II, Chapter I.

CONCLUSION

Throughout this work, various legal aspects of the Arab-Israeli conflict have been discussed at length. In these concluding remarks, various highlights crucial to the achievement of Palestinian right to self-determination will be made.

In so far as the Arab-Israeli conflict is still open to the search for a lasting solution no authority can legally address the Palestinian people without active participation of the P.L.O. Those who still ignore this Organization may not necessarily be looking for a lasting peace in the Middle East. The failure of Camp David Agreements and the Egyptian-Israeli Peace Treaty to bring a lasting peace for the whole region gives ample evidence.

The P.L.O., as a national liberation movement, is a subject of international law although it has yet to establish itself beyond the diplomatic level. Subjects of the law of nations are not rigidly and immediately circumscribed by any definition but capable of modification and development in accordance with the requirements of international intercourse. Just as individual persons have become subjects of international law in the field of human rights, so too are national liberation movements representing the will of people in the struggle for the right to self-determination. The legal effect for supporting national liberation movements in a series of activities has been the formation of binding rules in international law protecting such movements. For example, challenging the observer status granted to national liberation movements in various international organizations or an international humanitarian law agreement such as the 1977 Protocol 1 Additional to the 1949 Geneva Conventions in so far as it refers to legitimate wars of national liberation conducted by national liberation movements, is to blatantly ignore the already established rules.

Indeed, the customary blanket prohibition against use of force in international relations seem to have recently been qualified to the extent that it no longer applies in situations of wars of national liberation. Many states have adopted a pragmatic approach toward the United Nations Charter by conceding violence to be the only practical means against colonialism, alien and racist domination whenever peaceful negotiations have not produced the desired results.

The Palestinians have clamoured for separate statehood for so long and the P.L.O. has recently indicated readiness to co-exist with Israel.[1] It is high time that

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[1] M. Mautner, "West Bank and Gaza: The Case for Associate Statehood," 6 Yale Studies in World Public Order 341-2 (1980). For an expression of the Palestinian claim for a state in the West Bank and Gaza, see Khalidi,

Israel relinquish the occupied territories and let Palestinians establish a separate state in West Bank and Gaza. All other options including creation of servitude or integration with Jordan do not seem to be acceptable to which Israel or Jordan may not handle. Moreover evidence from both Arabs and Jews since the beginning of the British Mandate in Palestine point overwhelmingly to the impossibility of shared jurisdiction within a single or associated political entity. The deep suspicions mistrust and hatreds that separate them would be enough to prevent their cooperation in any effort which so closely touches their vital existence.

Since the consent of people and assurance for safeguard of their basic rights are the cornerstone for associated statehood, this measure is not feasible in the occupied territories because the Palestinian Arabs do not trust Israel. Israel harbours the same feelings about the P.L.O., lest it establishes a state prejudicial to its interests. In any case, what seems to be important at the

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"Thinking the Unthinkable: A Sovereign Palestinian State," 56 Foreign Affairs 695 (1978). See also "Waltzing Round a Formula," in which Mr. Arafat (P.L.O. Chairman) "repeated . . . the formula that the P.L.O. is prepared to establish a state in any liberated territory. This is held to imply, in a rather negative way, that the Palestinians are not still insisting on a single state for the whole of Palestine, and are therefore also accepting the need to co-exist with Israel." The Economist (London), 14 July 1979 at 54.

present is for the P.L.O. and Israel to take cognizance of the real situation. Both parties are entitled to self-determination in the same pre-1948 area. The conflict can only be resolved by Israel relinquishing the occupied territories for the P.L.O. while the latter formally accepts peaceful co-existence with Israel.

The United Nations Security Council Resolution 242 of 1967 calling for Israel's withdrawal from occupied territories and for all parties to make peace remains the central feature for resolving the conflict; there is still a chance for the United Nations to participate in the search for a lasting solution. What needs to be done is for this international body to exert pressure on both sides to come to peace negotiations which will endure, *inter alia*, the achievement of Palestinian right to self-determination.

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